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Rogers for Defendant (on d

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Clerk.

IN THE

# Supreme Court of the United States.

OCTOBER TERM, A. D. 1901

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THE STATE OF KANSAS,
*Complainant,*
*vs.*
THE STATE OF COLORADO,
*Defendant.*

No. 3
ORIGINAL.

## REPLY BRIEF OF DEFENDANT ON DEMURRER TO BILL.

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# In the Supreme Court of the United States.

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| THE STATE OF KANSAS, Complainant, vs. THE STATE OF COLORADO, Defendant. | Original, No. 10. |

The period elapsing between the filing of complainant's argument and the date fixed for hearing the demurrer is altogether too brief for the preparation of an extensive reply to every part of it. This is a subject of some regret, since the exhaustive analysis of the complainant's case by its distinguished counsel demands our full consideration. This we shall give as far as our limited time will permit, but must of necessity confine ourselves to those features of the argument which seem to be most germane to the issues tendered by the demurrer.

To some extent our task has been lightened by an unexpected concession of the State of Kansas, which assures us that in so far as the waters of the Arkansas can be utilized for irrigation purposes in Colorado, and then returned to the bed of the river, and in so far as the waters can be diminished in seasons of flood, and at other times "without injury to ourselves" (Kansas?) their taking will not be resisted (p. 4, Complainant's Argument).

For this concession we are truly thankful, and our gratitude becomes superlative as we read the additional assurance that the complainant neither asks nor expects the destruction of the irrigation ditches heretofore constructed and now used by persons and corporations in Colorado. It diminishes, however, in view of the contention that some restrictions should be placed upon the use of

the water, while the State of Colorado must be prevented "from using its vast power and wealth in diverting the waters and in granting others authority to do so" (p. 4). This qualification seems analogous to those exceptions which sometimes, occurring in Statutes, neutralize or destroy whatever was originally sought to be subserved by their enactment. If water may not run in our ditches, or, running, must do so under "restrictions" provided by Kansas, the assurance that they will escape destruction is somewhat suggestive of Portia's romantic judgment. Our ditches may, if they cannot be used to conduct or distribute water over the arid plain, present some features of value to the antiquarian, or the traveler, they would be of no possible use to their present owners, and if the claims put forward by Kansas in support of its right to the relief prayed for in its bill are sound, and its assertion of injury already suffered at the hands of the defendant's people are not imaginary, we apprehend that the "restrictions" it would place upon the use of water by our citizens would thoroughly demonstrate the practical efficiency of Senator Douglas' famous theory of "unfriendly legislation."

The qualified and diluted character of the complainant's concessions are on second thought not inspiring. They seem to reserve the essential thing to which this controversy relates. A railway without trains or a court without jurisdiction may possess some elements of interest or value. But a canal without water in the arid regions of America is the most useless thing on the surface of the earth. And we may add that it would be the dryest thing to be found thereon if it existed in Colorado, and depended upon a water supply subjected to such "restrictions" as Kansas might be authorized to impose.

It may be, however, that our solicitude for the water instead of the conduits constructed for its enjoyment has unduly magnified our skepticism concerning the assurances of the complainant. If so, we invite reproof. They are, however, so phrased and so seemingly inconsistent with the averments and prayer of the bill that we can regard them in no other light. Indeed, if the complainant means that the *status quo* in the Arkansas Valley is not to be disturbed, except to restrain the State of Colorado from making diversions of its own or from granting authority to others to make future diversions of water from the channel of the Arkansas River, there is an end both to the controversy and its discussion; for, in fact, the State has never diverted a drop of water from the river, and past

appropriations by private interests exceed in the aggregate its flood capacity. These last are not *franchises* limited in duration by the sovereign power, but *property ;* and as such exempt from forfeiture, or extinction by lapse of time.

The bill declares that Kansas ever " since 1889 is and has been entitled to the full, free and natural flow of all waters which naturally flow in said river and beneath said lands ; and the rights of the State thereto are prior and superior to any right or claim of the State of Colorado accruing, acquired or established subsequent to said date " (p. 11). Also that " its rights (and those of the owners of lands in the Valley) accrued prior to any of the said diversions by or in the State of Colorado, and prior to the accruing of any of the pretended rights claimed by the State of Colorado, *or by persons, firms or corporations now taking* water from said river or its tributaries." (p. 21). It also declares that the State and the various persons, firms and corporations engaged in this diversion " have by so doing wrongfully, illegally and unlawfully diverted said water from the accustomed channel into and across the State of Kansas, and have irreparably injured the State of Kansas and the inhabitants thereof." (pp. 21 and 22). That " the said damages are the proximate and necessary result of the diversion " aforesaid ; that its amount " is enormous and beyond computation, and amounts to vast sums annually," and such damages " have increased year by year for the past ten years in proportion as the diversion has increased." (p. 22). The prayer of the bill is in accord with its averments and as to the " various persons, firms and corporations " asks that their rights, franchises, &c., be neither enlarged, extended or renewed.

In view of these and other averments of the complainant's bill, we sought in the brief for the demurrer to impress the Court with the injustice of concluding or impairing the property rights and interests of numerous individuals and associations, not parties to the proceeding, at the instance of the State of Kansas, and in favor of numerous alleged riparian owners of land in that State, who were not parties to the bill. We also called attention to the impossibility of making them, or any of them, parties hereto, and, in that connection, challenged both the equities of the bill and the jurisdiction of the Court. The complainant's brief is the result of patient labor and exhaustive inquiry. It does not, because it cannot, meet this contention. It could not have been overlooked.

The assurance of the complainant concerning the irrigation rights of persons and private corporations comes, therefore, because it could not be withheld. The point is yielded in the face of inexorable conditions, both of fact and of law. The acts complained of are as wrongful and unlawful as when the bill was filed, the resultant injury as far-reaching, irreparable and continuing now as then. But *the right to relief* — a non-existent factor without which the problem must remain unsolved. And so we may continue our misconduct, subject to possible "restrictions" and to extinction when the "right" expires.

## Water Rights Property as Distinguished from Franchises.

We have said that the complainant, by its avowed purpose not to disturb existing conditions as they relate to individuals and associations, has, if that purpose includes water as well as canals, terminated the controversy. But since it asks that the State of Colorado be laid under an interdict as to the "continuance of such diversion thereof after the charter, license, permit or authority theretofore granted for that purpose shall have expired," it may contend for a decree operating *in futuro* upon these private interests, whereby their power to persist in alleged wrongdoing may at some time be permanently terminated.

A misconception of the nature of an estate or interest in water appropriated or diverted for purposes of irrigation runs through the warp and woof both of the complainant's bill and argument. It assumes that these rights are similar to privileges bestowed by State and city authorities upon transportation, water, light and power companies. It would treat them as though they were like toll road or ferry franchises granted under restrictions limited both in time and extent, and dependent for continued existence upon regrants or renewals by the sovereign authority. Hence, the prayer that these "permits, charters, licenses or authorities" be buried without possibility of resurrection when they die.

It is true that in Colorado, as elsewhere, bodies corporate are limited to a term of years; but it is equally true there, as elsewhere, that their property passes when they become extinct, to their successors, and does not revert to the State. Counsel seems to have confused corporate existence with property rights, or they would

not have erred in treating the ownership of water as something limited by statute to a term of years. Such an interest may be lost by abandonment. It can only be acquired by appropriation, purchase or condemnation.

The right to water, acquired by priority, is the subject of property, and may be sold or conveyed in whole or in part, either with or apart from the right to the land. It does not pass as a mere easement or appurtenance.

Cache la Poudre Co. vs. Larimer Co., 25 Col., 144.
Cache la Poudre Co. vs. Larimer Co., 8 Col. App., 237.
Strickler vs. Colorado Springs, 16 Col., 61.
Downing vs. Ditch Co., 20 Col., 546.
Middle Creek Co. vs. Henry, 15 Mont., 558.
Carman vs. Staudaker, 20 Mont., 364.
Wold vs. May, 10 Wash., 157.
Burnham vs. Freeman, 11 Col., 601.
Merritt vs. Judd, 14 Calif., 59.
Hart vs. Plum, 14 Calif., 148.
Reed vs. Spicer, 27 Calif., 57.
Clark vs. Willett, 35 Calif., 534.

Like other forms of property, it is subject to execution, passes by devise or descent, bears the burden of taxation and receives everywhere the protection of the law. It springs into existence by the act of appropriation, is a *vested interest* by the customs of the people, the laws and Constitution of the State and the Acts of Congress. Such being the status of a water right, it is difficult to perceive how it can terminate, or how the State of Colorado can be enjoined from "renewing or extending" it. As well might this Court be asked to restrain the State from renewing the title to a mining claim, a farm or a flour mill when the life of the corporation possessing the fee thereto shall have lapsed by the passage of years.

Hence, it seems apparent that, since the status of affairs is not to be disturbed, that status must continue. Colorado cannot be enjoined from that which she cannot do, and the plight of Kansas would remain the same, though injunctions were multiplied many fold against the defendant State.

## Threatened Grants to Other Persons or Corporations Not the Subject of Injunction.

Apart from interference with State appropriations, the only subject of relief remaining to the complainant is its purpose to "restrain the defendant from granting, issuing or permitting to be granted *hereafter*, any charter, license, permit or authority to any person, firm or corporation for the diversion of any of the waters of the Arkansas River," &c. (p. 24 of Complainant's Bill). This it is clamorous for, and this it contends to be its due. But the right to such relief also presupposes that "water rights," so called, constitute a privilege or license which the State may grant, withhold or renew. We have shown the fallacy of the assumption. Any citizen of Kansas, or any other State, and any corporation organized under the General Laws for that purpose, may, without saying "by your leave" to the State of Colorado, appropriate for domestic, agricultural or manufacturing purposes the unappropriated waters of any natural stream in the State, divert it to the required point of user, and thereby acquire a property or fee to the water thus appropriated. A right of way over the land of others, resulting from custom, necessity and the peculiarities of climate, "as a right of local common law," accrues to him or to it, whereby he may transport his water to its point of destination.

Gould on Waters (3d Ed.), Sec. 234, p. 466, and the many cases there cited.

If the natural stream runs through the public lands of the United States, this right of appropriation springs from the statute of the United States found in the appendix to the complainant's brief. It would, in that case, exist independent of the State of Colorado, which can neither abridge nor deny it. How, then, can we escape the conclusion that, as to private appropriations *in esse* or *in futuro*, the complainant is powerless to restrain the defendant, whose power to grant or withhold "permits" cannot be found outside the four corners of the bill in controversy?

**The State of Colorado has the sovereign right to appropriate the waters of its natural streams and utilize them for the benefit of its own or the lands of its citizens.**

A mere statement of this proposition would seem to be sufficient. Certainly the burden is upon him who challenges its correctness, and seeks to throttle its exercise. Do counsel mean to contend that Kansas cannot, if her General Assembly so provides, construct canals and reservoirs for the diversion and enjoyment of the waters of her streams? Or that Oklahoma or Arkansas can prevent the exercise of such a right in the face of the edict of her own Legislature to the contrary? Since the decision in U. S. vs. Rio Grande Co., 174 U. S., 690, it is unnecessary to cite authority in support of the proposition that "as to every stream within its dominion, a State may change the common law rule and permit the appropriation of the flowing waters for such purposes as it deems wise." What it may permit to another it may itself perform. In times past, the States have builded roads, bridges and railways, constructed and operated canals, reserved and utilized the shores of harbors and inlets. They have pursued nearly all the vocations of trade and commerce, and have the unquestioned right as an attribute of their sovereign powers to appropriate and divert water for their own use, or for hire. If they shall interfere with the property of the Federal Government without permission, or impair the navigability of streams that are truly navigable, the United States may call them to account. Until then their right of procedure cannot be questioned, unless, as in the case of the Wheeling bridge, it destroys or injures the property and commerce of a sister State, or as in the Chicago canal case, it creates a nuisance upon a scale that endangers the lives and health of vast communities.

The Constitution of Colorado, adopted July 1, 1876, and accepted by the proclamation of the President, declaring its admission to the Union thereunder, August 1, 1876, declares the water of every natural stream not then appropriated to be public property dedicated to the uses of the people of the State, subject to appropriation as therein provided. It also declares that the right to divert unappropriated waters of any natural stream for beneficial uses shall never be denied. This is believed to be the first constitutional declaration of any State upon the subject. Others, notably that of Wyoming, have imitated our example.

But the Congress of the United States, at the session following the admission of Colorado, by the Act of March 3, 1877, enacted its first "Desert Land" law. It conferred upon citizens the power to reclaim desert land by conducting water thereon, and expressly declared that "*all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands, and not navigable, shall be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes, subject to existing rights.*"

Colorado alone of all the arid States and Territories was excluded from the benefits of the law. Why? Was it not because she had, by constitutional declaration, declared a policy applicable to the people and lands within her borders, whose beneficence Congress perceived, and therefore extended over all the others? And did not the two enactments supplement each other, covering together the arid area of the nation, Western Kansas and Nebraska alone excepted?

At that time the public lands in Colorado were vastly more extensive than at present. Every acre thereafter patented came within the purview of the Constitution, not alone as to rights of conveyance, descent, taxation and the operation of the general police powers of the State, but to the waters of natural springs as well. If the man who located and patented 160 acres intersected by a tributary of the Arkansas, or by the river itself, could utilize only such waters flowing through it as had not been appropriated, the man who located and patented 160 acres ten miles from such a stream possessed the added right of appropriating water for, and diverting water to, it.

But exactly 14 years after, and on March 3, 1891, Congress abrogated the exception, whatever its cause may have been, and enacted that the provisions of the law, and all its amendments, should apply and be in force in Colorado. The act provides for sites for reservoirs, for hydraulic works, for storage and for water transportation. Surveys and investigations are to be made by the Geological Survey, under the direction of the Secretary of the Interior, and an elaborate plan for reclamation provided.

The States, during this period, were taking part in the work of arid land reclamation. They were doing this on their own account. Their statutes are matters of judicial notice. So far as Colorado is concerned, the appendix to plaintiff's brief shows what Colorado

was doing in that behalf, and particularly as to reservoirs *for flood waters*. Congress recognized their work and its lawful character, for on the 18th day of August, 1894, an act concerning Desert Land Grants to States was approved. By its fourth section it is declared: "That to aid the public-land States [which would include Kansas] in the reclamation of the desert lands therein," &c., certain lands shall be donated; but, before any application is allowed, the State must file a plan with the Secretary of the Interior, which, *inter alia*, shall show the source of the water to be used for irrigation, &c.

Coming down to a later period, we find Congress, by Act of January 13, 1897, empowering "persons, live-stock companies or transportation corporations engaged in breeding, grazing, driving or transporting live stock to construct reservoirs on the public domain for furnishing water to such stock." By the Act, February 26, 1897, Congress empowered the States to improve and occupy reservoir sites to the same extent as individuals or corporations, and placed the charges for water from any and all reservoir sites "under the control and regulation of the respective States and Territories in which such reservoirs are in whole or in part situate." Will the complainant show wherein by its bill it gives the Court to know how many of the diversions it complains of are made under national and how many are made under State authority?

Senate bill No. 3057, now before the Committee on Public Lands, is intended to provide for the reclamation of arid lands. It is the joint product of all Senators and Representatives and Territorial Delegates from the arid region, assisted by lawyers and experts of experience in matters of irrigation and water storage. Recognizing the settled proposition that the States may regulate and provide for the use and diversion of the running waters within their respective domain, Section 8 of the proposed enactment declares "That nothing in this act shall be construed as affecting or intended to affect or in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation; but State and Territorial laws shall govern and control in the appropriation, use and distribution of the waters rendered available by the works constructed under the provisions of this act," &c.

By virtue of her own sovereign power, by the Constitution and laws of her own people, and by the authority of the United States Government, Colorado has the right, indeed is burdened with the

duty, of creating, enlarging and improving a system of irrigation, whereby its lands and those of the Nation may be subdued, and its wealth and population increased. For the first time in the Nation's history, one State has summoned another before this Court, and attacked one of its settled policies. Kansas does not ask for the suppression of a nuisance, or the dismantling of an improvement threatening disaster to her corporate property. She assails an industrial system developed during a period of more than forty years, that she may grow potatoes for the inmates of her reformatory, and provide a lawn for the recumbent beneficiaries of her Soldier's Home. She should at least by apt averment inform the court how her failure to do either is connected with the conduct of a State whose nearest border is more than a hundred miles from the nearest institution.

**Defendant's conduct being lawful can be restrained, if at all, only by its consequences.**

Hitherto we have been considering the complainant's theory that the acts of appropriation complained of were unlawful, and therefore actionable. Many of its averments and perhaps the greater part of its argument, are based upon that proposition, which concisely stated, is alleged to spring from the common law of riparian rights, attaching many years ago to all the domain in question, and leaving an impress thereon which neither time nor legislation can remove.

The complainant has devoted the first sixty pages of its brief to a discussion of what it calls "the march of the common law." That venerable institution, hoary with age, and crowned with honor, is submitted to a military discipline hardly suited to many of its maxims, and made to traverse an unknown region habitable only by savage men and beasts. It is divided into platoons, which, stationed in Indiana, Missouri and Texas, start by common consent for the headwaters of the Arkansas, where each arrives far in advance of the hardiest of Anglo-Saxons. At least that part of it which is sheltered by the maxim *aqua currit et debet currere solebat* was early on the scene, and with a belligerency which its recent association with martial discipline doubtless engendered, for the first time in the world's history took up its residence alone, and in a desert, to live as a solecism or to die

as it deserved. Primogeniture, the rule in Shelley's case and estates, in gavelkind, may have accompanied their riparian relative to the wild and inhospitable domain, or halted at the banks of the Sabine. As to this, tradition is silent, and the world cares not.

We do not dispute a single historical fact to which the complainant refers in its graphic description of marshes that stratified, and ordinances that ruled a land without inhibitants. Indeed, we are grateful for the eulogy the complainant has pronounced upon Captain Sopis, whose activities in early Kansas legislation seem to have some nebulous connection with the common law of that State, and which, together with the sinister threat of one of our numerous Lieutenant Governors is supposed to create a controversy between States, justiciable in this Court, as contemplated by Art. 3, Sec. 2 of the Federal Constitution. All these matters may be conceded. The fact remains that the common law of riparian ownership never applied to the region in controversy from the hour the white man planted himself in its wilderness, and made its lands his dwelling place. He could not have lived under its operation and therefore he discarded it, if it ever had even an abstract existence, for the only substitute compatible with the environment. The common law is made for man and by man, the reverse of which proposition seems to be the complainant's contention. The common law is never adopted save so far as is necessary to the wants or for the protection of a people.

Wagner vs. Bissell, 3 Iowa, 395.
Boyer vs. Sweet, 3 Scam. (Ill.), 121.
Lindsley vs. Coal, 1 Ham. (Ohio), 243.
Seeley vs. Peters, 5 Gilman (Ill.), 130.

The first act of the Kansas Territorial Assembly relating to what is now Colorado, and the first expression of the Colorado Assembly upon the subject in 1861, ignored the right as non-existent, or killed it if it survived even as a fossil in the strata with which complainant has metaphorically covered our plains and mountains. There is not an arid region in the world to which the law applied at any time in its history. It would be fatal to all schemes of habitation. As declared by Judge HALLETT years ago in Younker vs. Nichols the riparian owner in such a climate must himself go above his own lands for water, and below them for its discharge, if he would enjoy or cultivate them.

If Kansas had such a law, she repealed it as to all lands West of the 99th Meridian, by the Act of 1891, before quoted. Not only so.

She didn't so much as recognize a riparian right as property for which damages should be awarded by condemnation. She went farther than Colorado, in the establishment of her irrigation system, and buried riparian ownership, the law of percolating waters, underground streams, and ownership of waters in ponds and lakes, all in a common grave. But Colorado's irrigation system is unlawful forsooth because it overturns an ancient principle of common law.

By the statute of 1891, Kansas enacted:

In all that portion of the State of Kansas situated West of the 99th Meridian, *all natural waters, whether standing or running, and whether surface or subterranean*, shall be devoted "to irrigation, &c., and may be diverted from *natural beds, basins or channels* for such purposes and uses," &c.

But some damage or interference with the rights of others might result from such diversion, and provision was made for that. In view of the tender solicitude which complainant manifests for its own and the riparian rights of its citizens, one would have supposed that they would at least have been protected from the effects of its own legislation. Yet they are not mentioned. Nevertheless, it is provided "that no such diversion shall interfere with, diminish or divest *any prior vested right of appropriation* for the same or a higher purpose," &c., without condemnation and compensation.

By this proviso, we are advised that under the earlier statutes of 1886 and 1889, and perhaps before then, waters had been appropriated and diverted, that the riparian right had in Kansas as in Colorado perished, because inapplicable, and that the *property of the appropriator* lawfully acquired, could not be divested without compensation. It will be noted too, that the old law was more general than that of 1891, while that of 1895 enlarges the area of appropriation by extending it eastward to the 98th Meridian of longitude.

The 99th Meridian bisects the State at a point approximately 160 miles east of its Westernmost boundary. The vast area included between the Meridian and the boundary is watered by the Arkansas, the Smoky Hill, their tributaries and the tributaries of the Solomon and Republican. It is occupied by farmers and stockgrowers, whose needs for moisture are imperious. They have demanded and been accorded the right to appropriate water wherever found. The waters running or standing, those on the earth or beneath it, have all yielded to the requirements of population.

They have appropriated everything in or out of sight, and looking across the boundary into the domain of Colorado have seen that it was good. To their clamor for more water the State has responded, and the suit is brought not to protect the Reformatory or the riparian owner, but to obtain a fresh supply of water for continued appropriations in Kansas.

The answer of Kansas to this assertion of our original brief is somewhat petulant, and involves the admission of its truth. "What right," says the complainant, "has Colorado to cite the irrigation laws of Kansas? Water does not run up hill!" This is true, but not entirely conclusive.

We have shown that Kansas neither regards nor recognizes riparian rights west of the 99th Meridian, that if they actually exist, "those who are damaged by appropriators" cannot "apply to the Courts for relief," unless indeed, they may do so independent of the statute. Now, if Kansas is inspired in the filing of its bill, not by the wrongs of the riparian owner, but by the cupidity of its own appropriators we have and will assert the right to impugn her motives by directing the Court's attention to her own enactments. Justice, like charity, may sometimes begin at home, and those who invoke the remedies of a Court of Equity, ostensibly to right an alleged wrong, but actually to secure the property of their neighbors, must be denied relief. The maxim "he who seeks equity must do equity," is applicable to the sovereign State of Kansas, when she comes into chancery as a suitor, and her own code of laws demonstrates her disregard of its salutary requirements.

But we may refer to them for another and equally cogent reason; for we may show that the alleged evils which she attributes to our diversions, if they really exist, are the direct and unavoidable consequence of the operation of her own statutes. If this is so her prayer for relief must fail.

All the available water that stands or flows, surface or subterranean, between the point where the Arkansas River crosses the Kansas western boundary and the 99th Meridian has been appropriated. It has been taken from the surface and from the depths below. From the western boundary to the soldiers and soldiers' home that abuts upon the river to the reformatory that doesn't is a distance of more than a hundred miles. Is the diversion of moisture from the lands embracing these institutions, or from the lands of Kansas citizens along the river's course, due to the Colorado appropriator or to the Kansas appropriator? To the diversions

hundreds of miles away or to those within her borders and sanctioned and encouraged by the complainant's own legislation? And if it be true, as counsel assure us, that all who have suffered from Kansas appropriations may apply to the Courts of Kansas for relief, what is the complainant doing here? If "Sections 3524 to 3533, inclusive," provide for payment of damages to riparian rights their provisions may be invoked as well for Kansas as for any of her citizens.

With all due respect to the distinguished counsel for the complainant we venture the statement that the claim of injury to the lands owned by the State in the Arkansas Valley, through the diversion of water in Colorado, borders upon the grotesque. If the entire two thousand feet of water said to belong to the river were multiplied four-fold and allowed to cross the State line without diminution the Kansas appropriators would divert it all long before it reached the complainant's lands. The underflow which every system of irrigation promotes and increases would also be diverted. Is the complainant serious when she makes claim of injury by the action of defendant?

The retort that our demurrer admits the fact is not logical. The demurrer admits facts well pleaded and nothing more. If Kansas averred that Colorado, by her diversions of water, had disturbed the law of gravitation or confused the results of the multiplication table our demurrer would not make it so. Yet the one is just as conceivable as the other.

Apart, then, from the jurisdictional features of the controversy which have not been met by the complainant's brief it may be stated that the acts of the State of Colorado and her citizens, recited by the bill, are in all respects lawful, and the results flowing therefrom neither injure nor impair any right or interest of the complainant. The dismissal of its bill is, therefore, inevitable. It only remains to consider some special features of complainant's argument.

## State Ownership of the Bed of the River.

It would seem that the complainant, since the filing of its bill, has discovered its ownership of the bed of the Arkansas River within its territorial limits, and imagines that it is required, the stream being navigable, to maintain at all times the normal

flow of its waters. Were this the fact the duty would not be riparian, and, therefore, not germane to the bill. The bill avers navigability "under the laws and departmental rules and regulations" but is silent as to meander, and ownership. These, we presume, are assumed to be supplied by judicial notice. The stream may have been meandered, and its navigability in Kansas may possibly have been declared by law, or may have been recognized by authority, but we know not when or where. It is not, and never was, navigable in the true sense of the term.

But, if we concede complainant's contention of navigability, what then? Simply that the Federal Government is the custodian of all controversies relating to the impairment of its navigable attributes, and Kansas is out of court. If, on the other hand, Kansas owns the waterbed in trust for the public, and is the guardian of its waters, because they are navigable, what shall we say of her stewardship? She has authorized her own people to appropriate it from surface to bedrock, and they have done so. And yet, strange to say, the river is actually navigable from Fort Gibson to its mouth just the same. Surely, if the river is navigable in Kansas, so that she may own the river bed and give its waters away, it is navigable also in Colorado, so that she may do likewise. The argument, therefore, if it be one, proves too much.

## The American Jus Gentium.

Just what counsel mean by this expression is not entirely clear. If they mean that disputes between States are to be settled by what is denominated "ancestral common law," and that the Supreme Court of the United States should hear and determine all contentions between States, exercising its jurisdiction by reason of the character of the parties, independent of the subject matter of the action, we reply that this subject has been exhaustively considered many times. It is well established what controversies between States are and what are not the subject of judicial determination; and it may be stated broadly that, exclusive of controversies relating to boundary, this Court has clearly defined its jurisdiction under the Constitution in the Wheeling Bridge cases and those of Wisconsin vs. Duluth, New Hampshire vs. Louisiana, Missouri vs. Illinois, and Louisiana vs. Texas. If this controversy does not fall

within their requirements, no "*jus gentium*" can avail the complainant.

With the exception of Chisholm vs. Georgia and Pennsylvania vs. The Bridge Company, counsel have barely referred to these cases. Louisiana vs. Texas is not even mentioned, and yet it is more nearly analogous to the case at bar than any of them. Missouri vs. Illinois is in contrast with it. There a great and continuing nuisance was threatened, dangerous to life and to health. Here the only allusion to that subject is that the flow of water in the river bed "conduces directly and materially to the public health." Missouri complained that Illinois was flooding the Mississippi with the polluted waters of the Chicago. Kansas protests that Colorado diminishes the flow of the Arkansas. The first is pregnant with menace to the lives of hundreds of thousands, and that circumstance gave the Court jurisdiction. The last contains no such element and its absence defeats the bill.

If Kentucky should file its biil against Pennsylvania, complaining that the Ohio and some of its tributaries have their origin in that State, and that the denudation of the forests by the citizens of Pennsylvania caused repeated and disastrous floods in the spring time, bringing ruin and desolation to Kentucky and her citizens, diminishing her revenues and destroying their property, and praying that Pennsylvania and her people be enjoined from the further felling of her forests, that nature might restore those previously destroyed, thereby ultimately preventing their recurrence, the proceeding would be in harmony with the one at bar. Could such a bill be maintained in this court or at all? The bill in the Wheeling Bridge case was sustained and jurisdiction of the subject matter established because the bridge of the defendant company was *an unlawful obstruction and because the injury to the complainant State was irreparable.* The union of these elements in some degree will be found in every controversy between States not involving boundaries, which this Court has adjudicated, and their absence is equally apparent in all those which have been dismissed.

## The Law Ex Necessitate Rei.

The complainant (pp. 91–3) seems to criticise the natural consequences of this principle rather than the principle itself. It is conceded to some, but not to all,of the waters of the Arkansas in Colorado. Since it is alleged in the bill that the defendant proposes to

divert *all of it*, and since the law of necessity gives Kansas the right to it for domestic purposes, it is contended that the argument is unsound.

If necessity furnishes a reason for any line of conduct it would seem that the one should be the complement of the other; and, until it is at least averred that some part of the waters of the river less than the whole is sufficient to satisfy the needs of the defendant and her people, we may assume that the needs are equivalent to the supply within our borders. What would counsel have? Do they concede a fourth, a half, or a greater fraction? "To deprive Colorado of some of this water might injure the State." The injury conceded *pro tanto*, what percentage will satisfy it? Counsel evidently realized the embarrassment springing from this admission, for they hasten to declare that the law of necessity may apply to individuals, but not to States, unless the latter mean war. This may be scholastic; it is not logical.

Necessity is the basis of irrigation wherever the system obtains. It dictated our own and the system of Kansas. It relates both to the individual and the community; for, if the first cannot till the soil without it, the latter must perish. Indeed, the necessity for the water in question by the Kansas people runs through every line of the bill. Their necessity is at least equal to ours, and becomes paramount in their eyes because they say that right and law are with them. Our contention is to the contrary, and the question cannot well be determined, and certainly cannot be avoided by the assertion that the element of necessity is lacking because it can only apply to individuals.

Nearly every decision upon the subject refers to necessity for its recognition. "Rules respecting the tenure of property," says Judge HALLETT, "must yield to the physical laws of nature, whenever such laws exert a controlling influence. In a dry and thirsty land it is necessary to divert the waters of streams from their natural channels in order to obtain the fruits of the soil, and this necessity is so universal and imperious, that it claims recognition of the law" (Younker vs. Nichols, 1 Col., 552).

Judge WELLS, in the same case, declares necessity and not the statute to be the foundation of the right. If it depended upon the statute another could take it away. Arising from necessity, it existed before the statute, and would survive its repeal.

See,

Gould on Waters, 213 *et seq.*
Pomeroy Riparian Rights, 138.

## Injury Resulting From Diversion of the Underflow.

We have hitherto questioned the soundness of the bill's averments concerning the defendant's interference with the underflow of the river, when contrasted with the provisions of the Kansas statutes, relating to the same subject, and under which the underflow must have been wholly appropriated. Irrespective of any diversions of the defendant or its citizens, Kansas has by its own legislation precluded itself from equitable relief against Colorado, were all its contentions sound and its remedy apparent. If every drop of water constituting the river's normal supply should cross the border, the citizens and corporations of Kansas would then meet and convey it North and South, and spread it over and across the plains as far as their topography permitted. If the consequences of this diversion to riparian owners be as stated, the fact is one for which the necessities of her people, and her own system of legislation is responsible.

But if Colorado has dominion over her natural streams, and may lawfully authorize their appropriation, the resulting injury to the sub-surface flow is *damnum absque injuria*, and there is an end of discussion. If, on the other hand, her policy concerning the surface waters of the State is unlawful, and must, therefore, be abandoned, the injury complained of to the underflow ceases. Since therefore, the rights of Kansas, if any, are to be determined wholly upon the right or authority of the defendant to divert the river itself, the complainant's brief would seem to be unduly burdened with extended reference to the law of subterranean waters.

But, were the rule otherwise, the complainant would be in no better position. Its authorities are applicable only to "a well defined and constant stream in a subterranean channel," "a contracted and bounded channel, though the course of the stream may be undefined by human knowledge." No such channel or stream is alleged in the case at bar. By its amendment (p. 23¼) to the bill, it is averred that

"the bed of said stream through the territory above described is without high banks, and in its natural condition, was but a few inches or a few feet below the bottom land adjacent thereto. During said dry portion of the year, said territory is subject to high and constant winds, and said winds change and fill up the bed of the stream, and the natural channel thereof with drifting sand, dirt and debris, until it is practically level with the lands adjacent

thereto, and said obstructions are rapidly becoming permanent by growing vegetation, willows and trees. And at the times of sudden and excessive rainfall in the State of Kansas, or sudden or excessive melting of snow in the State of Colorado, the flood waters thereof do not and cannot flow down the natural channel of said river, now filled and obstructed as aforesaid, but overflow said adjacent bottom lands, washing channels therethrough, depositing dirt and débris thereon, and doing great damage to stock pastured, crops grown and improvements situate thereon," &c.

Apart from its allusions to "growing vegetation," the presence of "flood waters from melting snows in Colorado" and "growing crops," all so inconsistent with the general plaint of the bill, this quotation declares that the very channel of the river is undefined, to say nothing of the underflow. The bed of this "navigable" stream, originally but a few inches below the adjacent bottom lands, easily changes, because the latter are level, broad and practically unbounded. Where is the subterranean channel? What defines it? Where are its limits? Is it "contracted," as the decisions would have it anywhere within the limits of the horizon?

Counsel have cited several authorities relating to under-surface streams, but not one in which the alleged damage resulted from lawful use or diversion of surface waters. The New York cases hold that the construction of water-works and pumping stations for the express purpose of draining adjacent land of its percolating waters for purposes of gain, gives the owner thereof his right to damages. But we ask in all sincerity: What have these decisions to do with the case at bar? Percolating waters are not mentioned in the bill; they are neither pumped nor drained out of the lands of Kansas. We have been assured by the distinguished counsel that water does not run uphill, and our diversions in Colorado, whatever else they may do, largely increase the area of percolation below them. Every drop of water entering the soil passes onward and ultimately finds its way back to the river. We do not drain, we actually feed the underflow in Kansas. The beds of the streams become dry every season; but, as the area of irrigation expands, the point of the current's disappearance travels eastward. The soil of the plains is like a sponge. Instead of drawing water from the bottom, Colorado is constantly pouring it on the top. If she were here complaining that, through the operation of the Kansas Statute of 1891, the subsurface waters of the Arkansas belonging to her people were abstracted by the irrigating companies of Kansas, her

petition would at least conform to the laws of nature, though it failed to state a cause of action.

## State Sovereignty.

If, as stated in the opening brief, dominion over the waters of natural streams within her own domain is subject only to restrictions which may be imposed by the Federal Government with relation to navigable streams, and to its own lands, it must follow that the exercise of such dominion by the defendant cannot be challenged by any other State in the sisterhood. Points of conflict may occur, but that is true of all the transactions of men, and the assertion that, "if the doctrine of State Sovereignty can be involved in this case, no suit can be brought either in Kansas or Colorado by any citizen of either against any citizen of either," is a *non sequitur*. The statement of such a conclusion justifies the inference that argument is unavailing, Indeed, this inference is irresistible if the complainant's contention that the Constitution of Colorado is unconstitutional, unless "subject to and limited by the rights of Kansas," is to be taken seriously. Kansas attacks the sovereignty of Colorado by this bill, if the acts complained of be within the sovereign power of the latter, and they are being exercised in a lawful manner. If, instead of diverting water from the Arkansas, the State embraced a large area of swamp land, held in private ownership, whose reclamation comprised a drainage system emtying into that river, could Kansas destroy the enterprise by legal proceedings in this Court? If this action is maintainable, the States will become chronic litigants, summoning each other before this tribunal to answer in equity, or to respond in damages, whenever it is conceived that the enterprise, the policy or the good fortune or one of them may result in injury or annoyance, actual or fancied, upon some of the citizens of another. The sovereignty of an American Commonwealth must mean something. Its boundaries have been defined, but it cannot be destroyed. If Kansas can successfully challenge that of Colorado, she will suffer equally, for Missouri or Nebraska may in turn challenge or deny her own.

## Conclusion.

It is assumed that our "demurrer admits that the damage already done to the State of Kansas is very great, and the threatened injury will detroy two of its most important institutions, that great injury has resulted to the property situate in that valley, with a constant diminution of the revenues of the State, and that the people and the State will suffer loss beyond calculation if threatened diversions be permitted." The inference is that the bill must be sustained.

With the conclusions of the pleader a demurrer has nothing to do. The office it performs is too well understood to justify discussion. Facts well pleaded are for its purposes assumed to be true. All else is subject to challenge. The conclusions grouped in the quotation just made received no sanction from our demurrer, nor, if conceded, can they be said to flow from the defendant's action. If A pleads that B assaulted his man servant, and thereby destroyed the value of his live stock, B's demurrer would scarcely preclude him from questioning the consistency or accuracy of the assertion.

We think we have shown that no damage alleged in the bill can be traced to the reputed acts of the defendant or her citizens, that if they exist, or are threatened at all, they appertain to individual rights of citizens in Kansas, and are directly traceable to the operation of her own law; that so far as they may be said to result from diversions in Colorado, they flow from the operation of laws entirely reasonable and within the province of her normal powers, and that the claim is ostensible merely.

The complainant brief is elaborate, but it does not answer our contentions.

First. That the alleged grievance of the State, considered apart from those of her citizens, is insignificant and improbable, and that, considered alone, the bill would never have been filed.

Second. That Kansas is attempting by this proceeding to procure an adjudication of the claims of her riparian owners against the claims of Colorado appropriators, of which her assertion of damage to her State institutions is the merest incident.

THIRD. That the adjudication thus sought is intended to secure an additional water-supply for appropriation in Kansas, where diversions have by law superseded the law of riparian right if the latter ever existed in its arid section.

FOURTH. That the State of Kansas is, in contravention of the doctrine of New Hampshire vs. Louisiana, lending her name and sovereignty to certain of her citizens claiming to have been damnnified by the delicts of the defendant and her citizens.

FIFTH. That the State of Kansas occupies in this proceeding the attitude of "*parens patriæ, trustee, guardian and representative*" of certain of her citizens, thus claiming indemnity, but in reality desirous of appropriating in Kansas that which has been lawfully appropriated in Colorado.

SIXTH. That the bill attacks and seeks to overthrow an established system of agricultural development founded with the advent of the pioneer, and essential to the life and progress of the commonwealth.

Admissions being in order, we may fairly claim the soundness of these propositions to be conceded by the failure of the complainant to meet and answer them.

We have considered the questions involved in this proceeding at a length which may test the patience of the Court, but, in palliation, we invoke the novelty and importance of the case. All cases are of importance, and allusions to the fact have become hackneyed. But in this instance the expression is fully warranted. Colorado lies upon the crest of the continent. Her valleys and plains descend from the Sierras toward the East and the West. Four of the great rivers of the continent and many of their tributaries have their origin in her territory, and are nourished by the snows of her mountains. The Arkansas, the Rio Grande, the Platte and the Grand traverse her domain, and cross her boundaries eastward, southeastward, northeastward and westward into Kansas, New Mexico, Nebraska and Utah, respectively. From each of them and from their tributaries water has for many years been appropriated and diverted for domestic, agricultural and mining uses by individuals and corporations acting under State and National authority. By this means they have wrung the treasures from the mountains

peopled the waste places of the desert, and made the land habitable and prosperous. The waters thus utilized have become property, vested, valuable, indispensable. Three million acres of land reclaimed and subdued produce supplies more than sufficient for the needs of her growing population, and represent a value of not less than $50,000,000. If Kansas may command the waters of the Arkansas within our borders at the behest of her riparian owners, Nebraska, New Mexico and Utah may do likewise with those of the Platte, the Rio Grande and the tributaries of the Colorado. The disastrous results of such a policy outreach the imagination. They pass beyond the domain of Colorado and involve every arid region of the West. The prosperity—nay, the industrial existence—of eight States and two Territories is directly concerned in the solution of the problem, for the determination of which Kansas has invoked the jurisdiction of this Court. We respectfully submit the demurrer in the hope that our contention in its behalf may receive the sanction of this great tribunal.

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# SUPREME COURT

Filed March 17, 1902.

# UNITED STATES

THE STATE OF KANSAS,
*Complainant,*
vs.
THE STATE OF COLORADO,
*Defendant.*

Original No. 8

8 Orig'l.

O. T. 1906

## REPLY AND SUPPLEMENTARY BRIEF TO THE REPLY BRIEF ON BEHALF OF COMPLAINANT.

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LUTHER M. GODDARD,
CHARLES S. THOMAS,
PLATT ROGERS,
HENRY A. DUBBS,
Of Counsel.

IN THE

# SUPREME COURT

OF THE

# UNITED STATES

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THE STATE OF KANSAS,
*Complainant,*
vs.
THE STATE OF COLORADO,
*Defendant.*

Original No. 10.

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## REPLY AND SUPPLEMENTARY BRIEF TO THE "REPLY BRIEF ON BEHALF OF COMPLAINANT."

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The inquiries addressed by the court to the counsel of the respective parties, at the time of the oral argument of this case, directed attention to the marrow of the controversy and induces us to take advantage of the privilege accorded of presenting a further brief, in which we will notice: First, the legal effect

of the present contention of Kansas; second, the right of Colorado to adopt and maintain such policy as she may deem proper with respect to the waters within her limits; and, third, such matters appearing in the reply brief of the counsel for the State of Kansas as may seem to require comment.

If the legal principle which Kansas asserts as the basis of her action is correct, then she would be entitled to prohibit all diversions of the Arkansas river in Colorado, except to the limited extent permitted to riparian owners at common law. Understanding from the bill filed upon behalf of Kansas that the eventual relief demanded was the enjoining of present actual, as well as future possible, appropriations, we raised by our demurrer the question of necessary parties, both plaintiff and defendant, which, in line with the recent opinion of the court in the case of the State of Minnesota vs. The Northern Securities Company, would have proven fatal to the present proceeding. Kansas seeks to avoid this objection by waiving all claim to relief as against present appropriations and by its principal brief explicitly states:

> "We wish it understood that we do not ask or expect the destruction of the irrigation ditches heretofore constructed and now used by persons and corporations in Colorado. Doubtless some restriction should be placed upon the use of the water, but it is sought by this proceeding merely to prevent the State of Colorado from using its vast power and wealth in diverting these waters and to stop it from granting authority to others to do so." (Page 4.)

In her reply brief, which has been filed since the oral argument, it is said:

> "If the entire relief is granted, it will leave undisturbed the claims of the great numbers of private appropriators to the use of the water. Any further litigation of this nature must be in suits between persons or corporations, commenced in the state courts of Colorado or in the United States Circuit Court for that district, in which the burden of establishing the superior right to the water will be upon the Kansas plaintiff." (Page 3.)

The substance of its contention, therefore, is to challenge the validity of the Constitution and statutes of Colorado concerning the streams of that state that flow into other states, upon the theory that it takes from adjoining states, and the citizens thereof, rights and privileges to which they are entitled. That the Constitution and statutes of a state should not be stricken down unless they plainly and palpably violate some right granted or secured by the national Constitution, or encroach upon the authority delegated to the United States for the attainment of objects of national concern, was declared to be the policy of this court in

Plumley vs. Mass., 155 U. S., 479.

The only authority or principle relied upon by Kansas in support of her challenge is the common law doctrine of riparian rights, which she insists is

as applicable as though the States of Colorado and Kansas were private riparian owners. Whether the counsel for Kansas, in their brief and argument, have given the right definition of this common law doctrine, was mooted at the hearing and may well be questioned. But, whatever that doctrine may be, it is the contention of Colorado that she is not bound thereby, except at her own election.

B. & O. R. R. Co. vs. Baugh, 149 U. S., 368.
St. Louis vs. Meyers, 113 U. S., 566.

In our former briefs and in the oral argument, we insisted that Colorado was foreign to all other states for all but federal purposes, and sovereign as to all things within her boundaries, and that, as a consequence, she was justified, if her geographical situation and material welfare demanded, in consuming, or permitting to be consumed, for beneficial purposes, all of the waters within her boundaries. The question having been put directly by the court, on the oral argument, as to whether this could be carried to the extent of absolutely depriving Kansas, and the citizens thereof along the Arkansas river, of the waters of that river, which must be the necessary consequence of the position which we take, we therefore beg to add some additional authorities bearing upon this contention.

By the common law before the American Revolution, the courts of the several colonies (and, therefore, the colonies as well) were deemed foreign to each other, and the extent to which the records and judicial proceedings of one colony should be received in

another was determined by the principles of international law.

Hilton vs. Guyot, 159 U. S., 180.

By becoming members of the American Union, the colonies did not cease to be foreign, except for federal purposes, and they retained their original sovereignty within their respective boundaries, except as a portion thereof was delegated to the general government.

Rhode Island vs. Mass., 12 Peters, 720.
People vs. Tyler, 7 Mich., 255.
1st Wharton's Digest International Law, section 1.

And the several states which now comprise the Union are sovereign as to all powers retained by them. Under the confederation they retained every power, jurisdiction and right not exclusively delegated to the United States, having all the functions essential to separate and independent existence.

Texas vs. White, 7 Wallace, 720, 723.
Wheeler vs. Smith, 9 Howard, 78.
Pomeroy's Lectures on International Law, section 127.

Their power to conserve and promote the public health, good order and prosperity is a power originally and always belonging to them, not surrendered by them to the general government nor directly re-

strained by the Constitution of the United States and essentially exclusive.

Collector vs. Day, 11 Wallace, 124.
Mugler vs. Kansas, 123 U. S., 623.
Dent vs. West Virginia, 129 U. S., 122.
In re Raher, 140 U. S., 554.

And it may be exercised by each over all persons and property within its boundaries.

Providence Bank vs. Billings, 4 Peters, 563.
Suydam vs. Williamson, 21 How., 433.
Pennoyer vs. Neff, 95 U. S., 722.
Cardwell vs. Bridge Co., 113 U. S., 208.
Cole vs. Errol, 116 U. S., 524.
Arndt vs. Griggs, 134 U. S., 321.

Even to the extent under proper conditions of restricting free navigation.

Escanaba Transportation Co. vs. Chicago, 107 U. S., 678.
Gilman vs. Philadelphia, 70 U. S., 713.

The states of the American Union are recognized by writers on public international law as possessed of all the incidents of sovereignty in the same degree as though absolutely independent, so far as their sovereignty has not been granted to the general government. By some writers they are termed "half sovereign," which they explain to mean that the sovereignty which originally was in the individual states

has been severed and distributed according to the federal plan.

In the recent work of Mr. Taylor on International Law, section 124, it is said:

> "The states of the Union are a single state in all matters concerning the federal body as a whole, and yet a group of states perfectly independent in all matters which concern each member of the group as a local self-governing community."

In Glenn's International Law, page 20, it is said:

> "When states are joined by unions, the effect upon the individual state depends upon the nature of the bond which unites them. The independence of a state can be impaired to a certain extent and the individual state still be partially subject to international law. In other words, the personality of a state forming a union is not wholly merged, and in those matters not committed to the will of the others by the articles of union, it retains its personality."

Wheaton's Elements of International Law, part 1, chapter 2, section 24, speaks of the states having *conferred* all power over international relations with foreign states upon the federal government, and that the *external* sovereignty of the nation is thus vested exclusively in the Union, but their complete inde-

pendence and sovereignty in respect to all matters not thus conferred is recognized.

Gallaudet on International Law, page 69, says:

> "The formation of the Union did not annihilate the respective autonomy, the vital liberty, the essential activity of each of the integral parts of the aggregation."

That the independence and sovereignty of the state, as those terms are used in public international law, are not destroyed by the act of union, except so far as expressed in the articles of union, is declared in

Maines International Law, page 37 et seq.
Halleck's International Law, page 71.
Gallaudet's International Law, page 65.
Hall's International Law, page 45 et seq:
Manning's Commentaries on the Law of Nations, page 95.

But though the American states are, as to all relations not governed by the federal compact, foreign to each other, it was not contemplated that controversies between them should be settled by reprisal or force of arms. To secure a peaceful and orderly adjustment of such differences, power was lodged by the Constitution in the Supreme Court of the United States to hear and determine the same. The history of this feature of the Constitution is fully set forth in the case of

Missouri vs. Illinois and Chicago District, 180 U. S., 208,

from which some idea may be formed as to the controversies that were thought possible to arise, and over which it was intended to give the court jurisdiction. It was at first provided that the controversies should be those concerning boundary, jurisdiction or any other cause whatever. Finally the court was given jurisdiction of "all controversies between states." In giving effect to this provision of the United States Constitution, the first inquiry which naturally presents itself is as to the causes for which a state may be summoned to the bar of the Supreme Court, and by what code of laws the controversies shall be determined. Now it must be obvious that whatever a state does within the powers not delegated to the federal government, whatever may be the effect upon a sister state, is not subject to challenge or correction unless it violates some principle of law that would constitute a legal grievance which the injured state might legally redress by reprisal or war if the Union had not been formed. The Supreme Court is, in a sense, an international tribunal whose functions are limited to the controversies which the several originally independent states agreed to submit to its decision. It is not a tribunal vested with arbitrary power, since that would enable it to destroy the sovereignty of a state, but a tribunal bound by all the rules and principles of law applicable to the subject. It was not the intention of the original states to surrender some sovereignty by the contract of union and some sovereignty by judicial decree. It must, therefore, find its rule of decision in the law which controls states in their relations to each other. If the states are sovereign over the persons, and properly within

their jurisdiction (saving always the superior authority of the federal government over certain matters which have no bearing upon this inquiry), it must follow that each state may do every act and adopt every policy it thinks essential to its perpetuation and welfare, and that when challenged by a sister state it may justify itself by the same principles of law to which it might have appealed, if it had not entered into the Union.

This leads us to the answer which we think should be given to the inquiry suggested; namely, that the cause for which a state may be brought to the bar of this court is that which would constitute a legal ground of complaint by one state against another if they were in all respects independent and sovereign, and that the code of law which should control is that known as international, or the law of nations.

The controversy in this instance relates to the policy which the State of Colorado has adopted with respect to the waters exclusively within its boundaries, and which policy, as Kansas says, may result in the consumption of all the waters arising and flowing through Colorado, in the irrigation of land within its limits.

By the law of nations, the primary and absolute right of a state is self preservation.

Wheaton on International Law, page 85 (6th Ed.).

1st Phillimore on International L., page 162.

Westlake on International Law, page 110.

Gallaudet on International Law, page 102.
Taylor on International Law.
Creasy on International Law, 149.

The improvement of its revenues, arts, agriculture and commerce are incontrovertible rights of sovereignty.

Vattel's Law of Nations, book 3, chapter 3, section 42.

And it is at liberty to use its own resources in such manner and apply them to such purposes as it deems best, provided it does not violate the international right of other states.

1st Kent's Commentaries, page 25.
1st Phillimore on International Law, page 155.

Its climate and geographical position and the physical adaptations springing from them are recognized as justly influencing the laws of a state even as against the claims of another.

Story's Conflict of Laws, Sec. 1.

For these purposes, a state has dominion over all things within its territory, which includes all bodies of water, standing or running, within the lines bounding the territory.

Halleck's International Law, 157.
Lawrence's Principles of International L., 136, 137.
Vattel's Law of Nations, Bk. 1, Chap. 22, Sec. 278.

Amos' Lectures on International L., 46.

Pomeroy's Lectures on International L., 147.

Ferguson on International Law, Secs. 14, 15.

Hall's International Law, 97.

Davis (C. K.) on International Law, Chap. 6.

Davis (G. B.) Elements of International L., 44 et seq.

The functions of a state are best summed up in Hall's International Law, page 42, et seq., as follows:

> "Since states exist and are independent beings possessing property, they have a right to do whatever is necessary for the purpose of continuing and developing their possessions. * * * Under these conditions the following rights arise: * * * To do within its dominion whatever acts it may think calculated to render it prosperous and strong. * * * A state has a right to live its life in its own way, so long as it keeps itself rigidly to itself and refrains from interfering with the equal right of other states. * * * Again, a state is free to adopt any commercial policy which it thinks most to its advantage. * * * As between nations, the proprietary character of the possession enjoyed by a state is logically a necessary consequence of the undisputed fact that a state community

has a right to the exclusive use and disposal of its territory as against other states, and that in international law the state is the only recognized legal person."

The extent to which this dominion of a state may be exercised over waters within its limits is clearly established, and may be well illustrated by a stream rising and flowing through one state, and thence through one or more states to the sea, capable of being used both for irrigation and navigation; this illustration, of course, being confined to controversies between states, and not between a state and the general government. In the case supposed, it would seem that the right to use the stream for the various purposes to which it was adapted would be reciprocal, and that the stream should be considered as by nature intended to serve their mutual interests without power in any one state to exclude the others therefrom. The use by an upper riparian state of the stream as it passes through a lower state, for purposes of navigation, may be of the highest consequence in the development of its commercial and industrial interests and the promotion of its general welfare. Nevertheless, the authorities on international law concur in conceding to the lower state the right to close the river to navigation by the upper, upon the theory that to hold that a river which flows through the territory of a nation is to be regarded in any other light than as a part of its possessions and subject to its unchallenged dominion, would be inconsistent with the integrity of its territory.

1st Phillimore on International L., page 154.

Twiss on the Law of Nations, Part 1, Sec. 145.

Pomeroy's International Law, pages 151 and 153.

Taylor's International Law, Sec. 233 et seq., 281.

Creasy on International Law, page 224.

Glenn on International Law, page 54.

Halleck's International Law, 173.

Hall's International Law, 119, 120.

Lawrence's Principles of International L., 186.

By the same principles, the upper riparian state may make the fullest use of the waters in any given stream, the banks of which are within its territory, and that whether the stream throughout its course traverses the territory of one state or two or more states.

Story's Conflict of Law.

Twiss on Law of Nations, Part 1, Sec. 145.

People vs. Tyler, 7 Mich., 227.

Creasy on International Law, page 220.

Penn. vs. Wheeling Bridge Co., 13 Howard, 582.

Taylor's International Law, Secs. 217, 228.

Walker's Manual of Public International L., Sec. 16, page 35.

All questions as to the status of water exclusively within a given state, as the subject of public or private ownership, are to be determined by the *lex rei sitae.*

Barr's Private International Law, Secs. 231, 232, 233.

Story's Conflict of Laws, Sec. 23.

And this is true in the case of grants of land by the general government.

Hardin vs. Jordan, 140 U. S., 371.

The learning of the law of nations in this particular was thoroughly developed in the controversy between the United States and Spain respecting the navigation of the lower Mississippi, and the subsequent controversy between the United States and the British government respecting the navigation of the St. Lawrence. In these instances, as well as in the matter of the navigation of the Scheldt and other European streams, the privilege of navigation was secured upon principles of comity and not by strict right.

This brings us to a consideration of the recognition which this court has given to the principles of international law as between the states. In the controversy between Indiana and Kentucky concerning boundary, 136 U. S., 518, and in the like controversy between Iowa and Illinois, 147 U. S., 1, and in the like controversy between Virginia and Tennessee, 148 U. S., 523, this court founded its judgment, not upon the common law as a municipal law, but upon the principles of international law. And in general it is well understood that this court has adopted the law of

nations as a part of the law of the land to be applied in all proper cases.

Maines' International Law, 37 et seq.
Taylor on Public International Law, 136.
Hilton vs. Guyot, 159 U. S., 163.
Pacquette Habana, 175 U. S., 700.

In respect to comity, which, as is well understood, is an incident of the relations existing between states and nations founded upon mutual interests and convenience, and not upon strict right, its existence between the states of the Union, this court has said is always presumed, yet when as must occasionally happen, the interests or policy of any state requires it to restrict the rule, it has but to declare its will and the legal presumption is at once at an end.

Bank of Augusta vs. Earl, 13 Peters, 590.
Mahon vs. Justice, 127 U. S., 706.

In view of this opinion, it is evident that whatever may be the moral obligations of a state to observe the demands of comity, it is not one which may be the subject of controversy between states and enforceable by appeal to the jurisdiction of this court. It therefore follows that only those controversies are justiciable which, prior to the Union, would have been just cause for reprisal by the complaining state. Here again the authorities on international law concur in holding that reprisal may be made only when a positive wrong has been inflicted or rights *stricti juris* withheld.

Davis (Cushman K.) on International Law, Sec. 31, note by Healy.

Halleck on International Law, page 488.

Davis (G. B.), Elements of International L., 122.

Gallaudet on International Law, 199.

1st Phillimore on International Law, page 161.

It is to be understood that we are not contending that the dominion of a state over its territory justifies it in inflicting injuries upon an adjoining state. The distinction in this respect is presented by what may be done with respect to a running stream in times of war, according to the principles of international law. The state possessed of the upper portion of a river may, for the purpose of compelling the lower state to capitulate, divert the water which flows from the upper to the lower state, but it may not discharge or place into the stream noxious or poisonous substances, that thereby the health and lives of the people of the lower state may be endangered and capitulation secured. This distinction was apparently in mind in the case of Missouri vs. Illinois and Chicago District, in which the justiciable character of the controversy was made to turn upon the fact that Illinois had endangered the health and lives of the citizens of Missouri by casting into the Mississippi river foul and noxious substances. It is clear that if in that case Illinois had directed a tributary of the Mississippi into Lake Michigan in pursuance of a plan of internal development, or had discharged into the Mississippi river a volume of water greater than it naturally received in pursuance of a like plan, it would have constituted no cause of complaint.

When it is considered that what Colorado does is entirely within her own boundaries, and that her control is exercised over a subject which has never been within the jurisdiction of Kansas, and which, therefore, has not become property in Kansas, it must seem evident that her advantage is a natural and legitimate one arising from her geographical position, and that the damage, if any, suffered by Kansas is an incident of her inferior position on the stream.

Water in streams, like birds and beasts, is a wild, wandering thing, whose use is always founded on capture or restraint. If a state may intercept bird and beast in their natural migrations, why may it not as well intercept water in its natural course?

That the wisdom, justice and necessity of the policy of Colorado respecting its waters, as expressed in its Constitution and statutes, can not be questioned, needs no argument. The concurrent policy and laws of all the states of the Union, similarly situated, including Kansas as to its territory west of the ninety-ninth meridian, and the like policy and laws in the western provinces of Canada; the approval of the general government; the specific recommendation of government aid to irrigation by all the political parties of the country; the work of several departments of the government intended to facilitate irrigation development; and the approval and encouragement of the policy by the president of the United States, would seem to remove the matter from the sphere of the debatable. If the policy be unassailable, what checks can be put on its effective operation? Must Colorado pay Kansas or the owners of land along the Arkansas river for the water which has never passed beyond her

borders? If so, in what tribunal and by what law is she to secure the right to the use of such water; and if so, wherein lies her sovereignty over the waters within her own borders?

In addition to the foregoing, we call attention to some further authorities bearing upon the consequences of delay on the part of Kansas in bringing the present action, in which it will be noticed that this court, though it might well have applied the common or municipal law, evidently deemed the principles of international law alone applicable to controversies between states. This being a tribunal to which the State of Kansas could have appealed at the earliest moment, the necessity of prompt action was as much demanded as though she were a private suitor. That the assertion by the State of Colorado of ownership of the waters of the Arkansas river gave rise to a cause of action, if any existed, more than twenty-five years ago, is apparent. By laches, if not positive acquiescence, Kansas has surrendered all right to now question that ownership with its attendant right of application to beneficial uses.

Indiana vs. Kentucky, 136 U. S., 518.

Virginia vs. Tennessee, 148 U. S., 523.

Vattel's Law of Nations, book 2, chapter 2, section 149.

Wheaton's International Law, part 2, chapter 4, section 164.

Pomeroy on International Law, Sec. 107, et seq.

1st Phillimore's International Law, page 272, et seq.

Walker's Manual Public Internat. L., Sec. 13.

Glenn on International Law, page 50.

Hall's International Law, 110.

Twiss' Law of Nations, part 1, Sec. 129.

Taylor's International Public Law, page 264.

The inquiry pressed upon counsel at the hearing as to the exact meaning of a riparian right at common law, has induced us to make further examination of the authorities bearing upon that point.

If it be true that the last utterances of a court as to the rule that prevails is to be taken as always having been the rule, notwithstanding contrary opinions, then the last utterances of the courts of England give little encouragement to Kansas.

As to the claim made that Kansas owns the bed of the stream and therefore possesses in her sovereign capacity riparian rights, the negative is given in two decisions in England, in which it is held that the riparian right has reference to the shore or adjoining land; that is, is an incident to the beneficial use of the property abutting a stream, and is not an incident of ownership to the center of the stream, but of the ownership of the banks.

Lyons vs. Fishmongers Co., 1st App. cases, 662.

No. Shore Ry. Co. vs. Pion, 14 App. cases, 612 (Canadian Appeal).

In the last case cited, it was held that the riparian rights as there stated would obtain in every country in which the same general law of riparian rights pre-

vailed, *unless excluded by some positive or binding authority of the lex loci.*

In

Miner vs. Gilmore, 12 Moore, P. C. 131 (Canadian Appeal),

it was held that

"A riparian owner has the right to the use of a stream for any purpose or what may be deemed extraordinary use of it, provided he does not thereby interfere with the rights of other proprietors either above or below him. Subject to this condition, he may dam up the stream for the purpose of a mill or divert the water for purposes of irrigation, but he has no right to interrupt the regular flow if he thereby interferes with the lawful use of water by other proprietors and inflicts upon them sensible injury in their use of the same for domestic purposes and for cattle."

This is approved in

Commissioners, etc., vs. Hugo, 10 App. cases, 336.

In

Williams vs. Moreland, 2d B. & C., 910,

and

Kensit vs. Great Eastern Ry. Co., Eng. Rep., 23, Ch. Div., 556,

it is shown that the use below, which is thus protected against extraordinary use above, must be an actual appropriation which is substantially damaged, and that an upper proprietor may appropriate a part or all of a stream, and if prior to the appropriation of the lower, be protected upon the theory that the stream is *publici juris.* This decision was affirmed in 27 Ch. Div., 122.

In

Earl of Sandwich vs. Great No. Ry. Co.,
E. L. R., 10 Ch. Div., 707,

it is said:

"The riparian owner may take water for irrigation."

And this is stated to be the law of England in

3rd Burges Commentaries on Colonial and Foreign Laws, 422.

It will be observed by the opinions in the cases cited that, aside from domestic uses and the watering of cattle by the lower riparian owner, he could secure no greater rights in the stream, except by an actual appropriation, and that, aside from these minor uses, the several successive riparian proprietors might initiate rights to water by virtue of appropriation.

That the common law adapts itself to new conditions is declared by the courts of England, as well as by the courts of the several states. In

Caldwell vs. McLaren, 9 App. Cases, L. R., 392,

The Privy Council held, on a Canadian appeal, that certain states of Upper Canada could authorize the use of streams for floating logs, although at common law it would violate the right of the riparian proprietor. It was then said:

"The defendant proposes to bring his timber from the part of the stream above the obstacle by means of the improvements made by plaintiff. He does not claim to do this by any common law right, but by virtue of certain statutes. It can not be disputed that the legislature had full power to confer such a right, and whether they have done

> so or not must depend upon the construction of the statutes. * * * The right of the public to navigate a stream may be created either by prescription or by dedication by the owners of the soil within time of legal memory, and in an old-settled country like England it could be seldom material to inquire further than as to the modes of creating such right. But when the law of England was taken out to a new, unsettled country, where prescription could not exist, and dedication could rarely exist till after the country was to some extent settled, it became important to inquire whether the principles of the common law did not give such right independently of any user wherever the stream was in its nature capable of being navigated."

It was held that the statute authorized the use and that

> "it was clear that the legislature did intend for the good of state to impose the burden on plaintiff."

The only case cited in counsel's reply brief respecting the right of a riparian proprietor is that of

Sturr vs. Beck, 133 U. S., 541.

It is sufficient to say of this what was said in a former brief, that it turned upon the *lex rei sitae,* which, as we already have shown, is the law which must determine controversies in any given state.

Dakota established the doctrine of riparian rights, subject only to prior rights of appropriation theretofore made.

With respect to the Kansas statutes, it must be evident upon reading them that the construction

placed upon them by counsel is not justified. Provision for appropriation is distinctly made and the necessity of compensating riparian owners below is not suggested.

Though no attempt is here made to elaborate the contention advanced in our former briefs, that if the riparian right exists to the extent claimed by Kansas, it is an incident of the riparian land, and, therefore, strictly private property, and a right of action for its violation belongs exclusively to the private owner, and not to the state, and that proceedings for relief must be against the individual appropriator in Colorado whose acts produce the wrong, and not against the states whose acts end with the enactment of a statute, we, nevertheless, again call attention to this contention, as we believe it fatal to the bill. If the enactments of the legislature of Colorado, purporting to authorize appropriations, are nugatory as against the Kansas proprietors, they are equally nugatory as purporting to be the acts of Colorado, since the State of Colorado is not judicially responsible for the *ultra vires* acts of any of its governmental agencies. Relief must be had against those presuming to act upon such enactments and not against the state, as the latter can not be presumed to have authorized illegal legislation.

Virginia Coupon Cases, 114 U. S., 269, 290.
Pennoyer vs. McConnaughty, 140 U. S., 10.
Smyth vs. Ames, 169 U. S., 518.

Respectfully submitted,

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Attorney-General.

LUTHER M. GODDARD,
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Of Counsel.

No. 8 Orig.

Office Supreme Ct.
FILED
MAR 19 19
JAMES H. McKENNEY

Oral arg. for Defendant.

IN THE

Filed Mar. 19, 1902.

# SUPREME COURT

OF THE

3 Orig

C. T. 190

# UNITED STATES

THE STATE OF KANSAS,
*Complainant,*
vs.
THE STATE OF COLORADO,
*Defendant.*

Original No. 8

ORAL ARGUMENTS MADE BY COUNSEL FOR DEFENDANT FEB. 24TH AND 25TH, 1902, UPON HEARING OF DEMURRER TO COMPLAINT.

THE SMITH-BROOKS PTG. CO., DENVER.

IN THE

# SUPREME COURT

OF THE

# UNITED STATES

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OCTOBER TERM, 1901.

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THE STATE OF KANSAS,
*Complainant,*

vs.

THE STATE OF COLORADO,
*Defendant.*

No. 10, Original.

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WASHINGTON, D. C., MONDAY, FEBRUARY 24, 1902, ONE O'CLOCK P. M.

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The above entitled cause came on for hearing.

Appearances for the complainant: A. A. Godard, Esq., attorney-general of the State of Kansas; Eugene F. Ware, Esq. and S. S. Ashbaugh, Esq., solicitors for complainant.

Appearances for the defendant: Charles C. Post, Esq., attorney-general of Colorado; Charles S. Thomas, Luther M. Goddard, Platt Rogers and Henry A. Dubbs, Esquires, of counsel for the defendant.

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(At the request of counsel for the defendant, the time for argument was extended to three hours for each side.)

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## ARGUMENT OF LUTHER M. GODDARD, ESQ., ON BEHALF OF THE STATE OF COLORADO.

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Mr. Goddard: May it Please the Court—This is a suit ostensibly between the State of Kansas and the State of Colorado; yet an examination of the bill discloses that if any property rights of the State of Kansas are in controversy, they are so trivial and unimportant that were it not for the alleged injury to the property rights of its citizens, the bill never would have been filed.

It is apparent from the substance and tenor of the bill, and the relief asked, that the object is to obtain an adjudication as to the applicability of the common law doctrine of riparian rights as between individuals residing on the banks of the Arkansas river in Kansas, and corporations and individuals diverting the water of that stream within the State of Colorado.

Reduced to a synopsis of the ultimate facts pleaded, the case made is:

That the Arkansas river and its tributaries have their origin within the State of Colorado, with a drainage area of 22,000 square miles, all lying east of the Rocky mountains; that the river pursues an easterly course through several counties for a distance of 280 miles, where it crosses the eastern boundary of Colorado and enters the State of Kansas, and continues its course for a distance of about 300 miles through a broad valley said to contain 2,500,000 acres of land, the waters being necessary to the fertility and productiveness of this land. This necessity is said to spring from the lightness of the natural rainfall in the State of Kansas, the scarcity of tributaries therein, and the porosity of the soil.

The waters are said to be both surface and subterranean, the underflow being co-extensive with the valley; and both are indispensable to the domestic, agricultural and sanitary purposes of the people inhabiting the valley.

It is also averred that there is a large upland area in the western part of the state, or a plateau——

Mr. Justice White: The western part of what state?

Mr. Goddard: The western part of the State of Kansas. As I say, it is alleged that there is this large upland area in the western part of the State of Kansas whereon herds graze, whose watering-places are at the river, and that this pasturage therefore depends on both the surface and underflow of the river.

It is alleged, also, that the river is navigable in Colorado and Kansas under the laws and depart-

ment rules of the United States governemnt; that from Fort Gibson, in the Indian Territory, to its mouth, it is a large, navigable stream, used for the purposes of trade and commerce, and on which vessels ply.

The flow of the water from Colorado into Kansas at its normal height is said to be 2,000 cubic feet per second; but it is now much less because of the wrongful diversion by Colorado and its citizens.

It is alleged that prior to the admission of Kansas as a state several people had settled in this valley, and that all the portion of the valley east of Great Bend was settled between 1869, 1870 and 1871; that that portion of the valley was occupied by settlers who afterwards acquired title to the land from the state or from the Santa Fe Railroad Company; that the portion of the valley west of Great Bend was settled from 1872 to 1884; and that there is now a population occupying this valley of 100,000 people, who have made farms and built homes and cities on the banks of the stream.

It is alleged, further, that by the act of admission, Kansas became entitled, for school purposes, to sections 16 and 36 of each governmental township, and that by the Act of 1863 there were granted to Kansas the odd-numbered sections of land in this valley. This land was afterwards conveyed to the Atchison, Topeka and Santa Fe Railroad Company. The average value of the land in this valley is said to be $25 per acre, provided the flow of the river remains undisturbed.

The only specific property alleged to be owned by Kansas which is in any legal sense riparian is a

tract of land of 126.56 acres in Ford county, the title to which was conveyed by the government to Kansas in 1889, and which is now used as a soldiers' and sailors' home. It is alleged that it is the owner of another tract of land in Reno county of 640 acres, to which it obtained title in 1885. This land is not riparian. It is not alleged to be on the bank of the stream; but Kansas seeks to maintain this case, so far as that title is concerned, because of the allegation that it is watered by the underflow which is essential to its agriculture.

Mr. Justice Shiras: The first tract abuts on the stream, does it?

Mr. Goddard: Yes, sir; it abuts on the stream, and consists of about 127 acres.

The bill then sets out sections 5 and 6 of article 15, of the Constitution of the State of Colorado, which declares all the waters of the natural streams in the state to belong to the public, and dedicates them to the use of the people, subject to appropriation, as therein provided. It also declares that the right to divert unappropriated water from any of the natural streams shall never be denied. The bill alleges, further, that the general assembly of Colorado from time to time has adopted laws authorizing the diversion of the waters of the Arkansas river for purposes other than domestic, and particularly for agricultural purposes.

It is alleged that it authorizes the diversion of this water in extended artificial channels that reach a long distance from the bed of the stream, and that it uses water and stores water on nonriparian land. It then avers that upwards of 150 persons and corporations in the state of Colorado claim rights thereunder, and that each of them owns one or more ditches.

It states that reservoirs have been constructed for the storage and in which there are stored large quantities of water for irrigation, and that thereby Kansas is deprived of this water, and that the diversion is carried to such an extent that no water flows into Kansas from Colorado during the annual growing season.

It alleges that Colorado, in its sovereign capacity, claims the right to regulate and control the distribution of these waters, and that it is probable that other extensions and canals will be built unless the state is restrained by the process of this court.

Mr. Justice White: What restraint do you seek to impose?

Mr. Goddard: The State of Kansas is seeking to restrain us.

Mr. Justice White: But what does the bill seek?

Mr. Goddard: I was coming to that when I got through the statement of the bill.

Mr. Justice White: Very well; take your own course.

Mr. Goddard: Thank you; I will do so, then.

The only specific allegations against the State of Colorado itself are that in 1890 it built a ditch of its own near Canon City, through which it is diverting the waters and emptying them on nonriparian lands to the extent of 756.28 cubic feet per second, which water would otherwise flow into the State of Kansas.

Mr. Justice Brown: Does the bill define what are meant by nonriparian lands?

Mr. Goddard: It only takes the general meaning of the word; but nonriparian land, is, of course, land which is a distance from the bed of the stream. They undertake to claim in this bill that the land in the

valley is all riparian so far as the underflow is concerned. We, of course, contend that that is not possible. Of course, that allegation of fact is admitted by the demurrer, although counsel well know that Colorado never constructed any ditch which took out a drop of water.

It also alleges the adoption of a reservoir system as constructed and contemplated, and states the result on the natural flow of the stream. It says that Colorado, if not at present, but if it carries out this contemplated scheme, will become a great offender against the State of Kansas and its citizens.

The balance of the bill (I think I have stated the facts sufficiently) is devoted to the statement of conclusions of law respecting the riparian rights of Kansas and its citizens, the general effect of the diversion of the water by the State of Colorado, the damage suffered by Kansas in loss of revenue and population, and the damage sustained by its citizens in the decrease of the value of their property.

I now come, Mr. Justice White, to a statement of the relief asked.

Upon these facts the State of Kansas not only seeks to prohibit the State of Colorado from constructing ditches and diverting water from the Arkansas river through such ditches, but, because several of the Colorado canals are owned and operated by corporations whose charters are limited in time, in order to cut off the rights of these corporations and destroy the earlier water rights used by them, it asks an injunction restraining the State of Colorado from extending or renewing the corporate life of such appropriators. It also seeks to enjoin Colorado from grant-

ing or permitting to be granted any new charters or authority to any corporations or individuals for the purpose of diverting water from this stream.

Before referring to the legal propositions upon which we rely, I desire briefly to notice some inherent and fundamental objections which affect the entire proceeding, and, in our judgment, are conclusive upon the right of the State of Kansas to maintain the present bill.

As before stated, the real purpose of the bill is not to protect or enforce any rights which Kansas may have as the owner of property, or to prevent the invasion of such rights by the State of Colorado; but the keynote of the entire case is found in the opening sentences of the complainant's brief. They say, on page 2 of the brief:

> "A large and increasing number of persons and corporations are using the water from said river in Colorado for irrigating purposes. Many of the ditches used for this purpose are of great size and many miles in length. Much of the water so diverted is emptied upon arid, nonriparian lands and is lost to the stream, and each of said diversions contributes to the injury of owners of land in the Kansas valley. Among those engaged in so diverting and threatening further diversion is the State of Colorado, and among the riparian land owners in Kansas is the State of Kansas."

It is shown from the statement of the bill what property they own as riparian land.

"Suits by the single riparian owners in Kansas against the persons diverting the waters of this river in Colorado would involve a vast number of actions, and a vast complexity of facts and legal questions. All of the acts complained of are authorized by the State of Colorado, and that state is itself doing some of the things that are most injurious; its legislature has made provision for many more of such acts. Hence, the State of Colorado is, in contemplation, if not at present, the chief offender against the rights of property owners in Kansas. * * * This suit, in addition to the determination of such property interest as the State of Kansas has the right to have determined, and in addition to such questions of sovereignty and governmental rights as this court may see fit to pass upon, possesses the further merit that, in this one action, it is sought to prevent a great number of other actions which should be rendered unnecessary by the result hereof."

This is the gravamen of the bill. It is clearly an attempt on the part of Kansas, by virtue of its sovereignty, and under the provisions of the federal Constitution, to use the remedies thereby provided to enforce and protect the property rights of its citizens residing in the Arkansas valley as against the acts and wrongs of the users of water in the State of Colorado.

We are unaware of any theory or any principle on which this contention can be sustained, or of any

known rules of legal or equitable practice by which it can be supported. We know of no adjudicated case or principle that will entitle the State of Kansas to enforce this remedy against the State of Colorado. That it may not do so is settled by several decisions of this court, notably the decisions in the case of New Hampshire vs. Louisiana and Louisiana vs. Texas.

It is also the avowed purpose of the State of Kansas to obtain a construction of our Constitution, and an adjudication respecting the force and effect of our law, and to restrain Colorado from exercising its sovereign power.

We do not understand that it is within the power of any court to order, direct or control the action of a state in the adoption of its Constitution, or to minimize or destroy the force and effect of its organic act in any particular. Doubtless if Colorado were doing those things which invaded the property rights of another state, to that extent it might be reached and restrained by decree. But it can not in any way or manner, as we understand, be subject to judicial control in the adoption of its organic act or in the enactment of statutes that confer rights upon its citizens. Nor on any decided principle can a state be attacked because of its legislation, or held responsible for the wrongs done under the cloak of its laws by its citizens. If, therefore, it be true that the citizens of Colorado, under the legislation of that state, are diverting the waters of the Arkansas river and applying them to beneficial uses, and if it be conceded that that act or fact injures, destroys or materially lessens the fertility of that valley within the boundaries of Kansas, Kansas may not as a state complain against

the acts of these individuals in a suit against the State of Colorado, because, under its laws, the citizens of the latter state are doing the acts of which complaint is made.

If it be conceded that it is a wrong, it is one which may not be remedied in a suit between the states.

Mr. Justice White: If it is a wrong, how could it be remedied, sir?

Mr. Goddard: Not in an action between the states. It could be remedied in an action between the citizens of Colorado and the citizens of Kansas, in the proper forum.

Mr. Justice White: Yes; but of course I am now accepting, for the purposes of my question, your theory that the State of Kansas has no right, unless she has a property right, to file this bill.

Mr. Goddard: Yes, sir.

Mr. Justice White: My question presupposes that the State of Kansas has a property right. For the purposes of my question I am assuming that she presents such a case as would give this court jurisdiction from the statement of her cause of action, without reference to the defendant. If Colorado is ready to take in her state all the property which belongs to Kansas, or to authorize her citizens to take it—granting, of course, simply for the sake of my question, that there is such a property right on the part of Kansas—what would then be the remedy of the State of Kansas, upon your statement of the case?

Mr. Goddard: It would be against the State of Colorado, as I say, for any acts that its authorities may do. My contention is——

Mr. Justice White: Does not this bill contain an averment that the State of Colorado itself is doing these things?

Mr. Goddard: It does. I was simply introducing these preliminary objections to show that the present bill can not be maintained; that the complainant is attempting to deprive parties and corporations of vested rights of property without making them parties to the suit, or giving them an opportunity to be heard. That is the objection that I am now urging. I say it affects the whole proceeding, and is conclusive upon the right of the State of Kansas to maintain the present suit. I shall come to the matter of the controversy between Kansas as a riparian owner and Colorado as an appropriator a little later on.

I was going on to say that while the State of Colorado does, in a measure, exercise supervision and police control over the distribution of these waters among the various appropriators, it in no sense grants the right to such use. Those rights exist independent of any grant by Colorado. They have always existed. They were recognized by the federal courts before the state was established, and were recognized as pre-existing rights in the Constitution itself. Therefore that any infringement of the riparian rights of the people of Kansas by the appropriators of water in Colorado is not chargeable to the State of Colorado or that she can not be held responsible therefor, is, I think, too clear for argument. And this court, in taking judicial notice of the Constitution and legislation of Kansas, must eliminate all allegations that look to or charge that the Colorado rights are granted by the defendant, or that it is in any manner or any

way responsible for the injury that results from their exercise. And we confidently submit that the bill, so far as it attempts to hold the State of Colorado responsible for the acts of the 150 corporations and persons, the very fact which creates the injury complained of, is entirely without merit.

Mr. Justice McKenna. Will you not define that a little more precisely? That is, will you not define a little more precisely the rights you say were independent of the State of Colorado?

Mr. Goddard: It has the right to use and appropriate the waters of the natural streams. They were existing rights, as I say, before the state was established. They grew up under the custom of the country; and under the local laws and the decisions of courts they became vested property rights. The right to use the water, as I say, is not granted in any way by the State of Colorado, but it comes from the right derived from another source which I will presently notice. Is that sufficient?

Mr. Justice McKenna: Yes; that is sufficient.

Mr. Goddard: The bill, stripped of all its verbiage, and its naked claims presented, shows that Kansas, if injured at all, is injured only in regard to two specific tracts of realty; and the sovereignty of the state is used and the jurisdiction of this court is invoked to restrain Colorado in its legislation, and hinder its citizens in the exercise of their constitutional and statutory rights, because of two small tracts of land. One of these tracts is in Ford county, comprising about 127 acres; the other in Reno county, containing 640 acres. The latter is nonriparian. The tract in Ford county only is riparian; and we do not

believe that as to this tract even the bill states a case that would entitle a private owner, in a suit against an individual appropriator, to injunctive relief.

The bill does not, by apt averment of facts, show that the acts of Colorado have in any way or manner injured any right that the State of Kansas holds in and to this specific property. On the other hand, it substantially appears from the allegations that whatever injury Kansas has suffered has resulted from the policy adopted and pursued by the citizens of Colorado in the manner provided by its legislature, and in truth and in fact that is the real grievance complained of.

Nothing that the State of Colorado has done in the way of constructing canals or in diverting water from the river is necessarily or argumentatively or otherwise shown to have in any measure injured these particular lands in Kansas. On the other hand, and in truth, it can only be said that if the flow of the Arkansas river has been impaired, to the damage of the valley of the river in Kansas, it has come from the broad system of irrigation and diversion that has been adopted by the citizens of Colorado and carried on ever since the settlement of that country.

This being true, the complainant can not, under well-settled rules and equitable principles, maintain this bill without the presence of the individuals who have committed or are guilty of this diversion. They must be brought in and made parties, and charged by apt averments, so that their property rights may not be adjudicated, passed on or destroyed without an opportunity to litigate the question with the person who complains of their acts.

I now come to the question asked by the learned justice in regard to the case itself; and I say that if this court should see fit to eliminate all purely private matters between the Kansas and Colorado claimants, all the allegations that look to the deprivation of property without due process of law, and should hold that an issue between the State of Kansas, as a riparian owner, and the State of Colorado, as an appropriator of the water, is sufficiently stated and is of sufficient importance to invoke the jurisdiction of this court, then we contend and broadly assert that the doctrine of riparian rights insisted on by the complainant never prevailed in that portion of the country. Whatever the rule may be in other states and communities where that rule has been incorporated into their law, either by adjudication or statute, it was never incorporated into the laws or became the policy of the western country. On the other hand, Arizona, Colorado, Idaho, Nevada, New Mexico, Montana, Utah and Kansas herself, so far as the western portion of the state is concerned, have declared that the common law doctrine of riparian rights has been abandoned or never existed in the arid country.

There has never been any federal legislation making this rule of property applicable to the public lands. Congress has never so enacted. The complainant does not show any congressional act that establishes the riparian doctrine as a property right or a property rule in that section of the country. Therefore, when we are unable to find any local legislation making the rule applicable to that particular territory, and recognize the fact that the government originally owned all these lands, and that they passed

to the state or to individuals by grant or otherwise, we must look to congressional enactment and the policy of the government to determine whether or not the rule is enforceable in the particular territory in controversy.

It really becomes a question of governmental policy; and the applicability or nonapplicability of this rule must rest at last upon the determination of what the policy of the government was when it owned the lands, before it parted with its title, and what it has since been.

An examination of the congressional legislation on this subject discloses that from the very earliest settlement of that country the government has steadily, uniformly and without deviation opened the public lands to settlers, and adopted and pursued a course rendered necessary by the character of the country for their growth and development. Recognizing that the public domain could not be utilized without the use of water applied by artificial means for either mining or agricultural purposes, and recognizing that vast interests had grown up under the license of the federal government to use the water of the natural streams for these purposes, congress expressly abandoned its riparian rights, if any existed, and confirmed this right of prior appropriation of such waters by the Act of 1866. That such was the intent and purpose of this statute is declared in Atchison vs. Peterson and Basey vs. Gallagher. Mr. Justice Field, speaking for the court upon this subject, said:

> "It is evident that congress intended, although the language is not happy, to recognize as valid the customary law with respect

to the use of the water which had grown up among the occupants of the public lands under the peculiar necessities of their condition."

If the provisions of the act could be held to be prospective, and not, as has been held by this court, the recognition of an existing right rather than the establishment of a new one, it would avail Kansas nothing, because she obtained the title to both the Ford and Reno county lands subsequent to the date of that statute, and therefore took the title subject to its provisions and without any riparian rights or privileges.

By an amendment to the Act of 1866, made in the year 1870, all patents issued and all homestead or pre-emption rights allowed were made subject to vested water rights; and congress has ever since manifested a purpose to extend the largest liberty to the use of water of the natural streams to reclaim the arid lands under local regulative control.

In 1877 congress passed the desert land act, which authorized the entry upon the desert land by anyone who intended to conduct water thereon for its reclamation within a definite time. That act expressly provided that all surplus waters over and above those so appropriated, and all waters and lakes and rivers and the sources of water supply on the public domain, should always remain free and open for appropriation by the public for irrigation, mining and manufacturing purposes, subject to existing rights.

This act, with some additional sections, was made specifically applicable to Colorado in 1891. In 1888

congress passed a joint resolution directing a survey to be made of that portion of the arid country where agriculture was carried on by means of irrigation, to determine the practicability of constructing storage reservoirs for the storage and utilization of water for irrigation purposes, and appropriating $100,000 for that purpose.

In 1890 patents to all property west of the one hundredth meridian were required to reserve the right of way for canals and ditches.

In 1897 an act was passed opening the public lands for the right of way, location of reservoirs, and so forth; and that act provided that the privileges therein granted should not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective states and territories.

Numerous other kindred acts have been passed, and are referred to in the brief, which I will not now take the time to notice in detail. But suffice it to say that the fact that it is the purpose of the government to continue this wise and beneficent policy is shown by the attitude of the present administration and the pending legislation in congress. The president, who from personal observation understands and appreciates the magnitude of the arid region and knows its needs and possibilities, in his masterly way presented this subject to congress in his recent message. In urging upon that body the imperative necessity of constructing storage reservoirs, he said:

> "It is, in fact, a national function. It is as right for the national government to make the streams of the arid region useful by engi-

neering works for water storage as it is to make harbors and rivers useful by engineering works of another kind. This storage of waters in reservoirs at the heads of the streams is but an enlargement of our present policy of river control, under which levees are built upon the lower regions of the same streams."

Mr. Justice Shiras: Do you contend, sir, that with respect to nonnavigable streams, where there is no question of interstate commerce, it is the function of the federal government by statute to regulate the management of those waters for purposes of irrigation within the limits of states?

Mr. Goddard: No; I claim that it can, so far as its own lands are concerned. Being the owner of land, it can adopt any policy it pleases; but the waters as I shall contend, are under the control of the state and state legislation. But I state this policy of the government as showing that it has abandoned and done away with the common law doctrine of riparian rights, so far as the public domain is concerned. That is what I have claimed.

Mr. Justice White: You claim that from the Act of 1866 and the Desert Land Act?

Mr. Goddard: Yes, and other kindred legislation.

Mr. Justice White: How, then, do you explain the Act of 1866, where it speaks of vested rights—that a man taking public land shall take it subject to any prior vested right, etc.?

Mr. Goddard: I think it means just what it says—that the land shall be taken subject to any vested right of appropriation, or any other vested right.

Mr. Justice White: But it does not say "vested right of appropriation." It does not use that expression.

Mr. Goddard: I know it does not, but that is what I contend it means. Of course, it may be a vested right of riparian ownership. It may be taken subject to that; but it would be a physical and a practical impossibility to carry out a system of that kind. If the government is going to dispose of one piece of property in arid regions and allow the appropriation of water for its utilization, and then is going to sell a tract of land in Kansas and endow that land with the riparian privilege, and then a subsequent appropriator comes in and locates land in the arid region with an appropriation of right, that subsequent appropriator would acquire no right whatever, because he could not exercise his right without more or less diminishing or affecting the riparian right of the Kansas owner.

Mr. Justice White: Entirely irrespective of the Act of 1866, do I understand your claim to be that the necessary effect of recognizing the custom of miners and the local rights of the people, in so far as they have actually made appropriations, is to make all of the water, everywhere, no longer the subject of public regulation, but to place it in the domain of private appropriation exclusively for the benefit of the person who might take it?

Mr. Goddard: Well, I would not go quite that far.

Mr. Justice White: And no court has declared—

Mr. Goddard: But I would say that congress may retake the control, subject to that only.

Mr. Justice White: How can congress retake the control if it has been made subject to private ownership?

Mr. Goddard: It can not, so far as it has disposed of the land under prior legislation.

Mr. Justice White: I am trying to get your contention. Of course, unless we know clearly what you contend, it is difficult to follow your argument. Your court has declared, as I understand it, that wherever, under your territorial laws, a man had appropriated water, that appropriation of water, although it stripped a whole area and everybody else in the area of water, was as much a private right as a man's other property—his horse or his cow or anything else?

Mr. Goddard: Yes sir.

Mr. Justice White: And that the provisions of your Constitution which regulated the uses of that water did not apply to him, because as to him that would be taking private property for public use?

Mr. Goddard: Yes.

Mr. Justice White: That is what I understand to be the doctrine of the Colorado courts?

Mr. Goddard: Yes, sir.

Mr. Justice White: Now, then, according to your statement, if the act of congress or the recognition of the custom of miners fixes the rights of private property everywhere, irrespective of an appropriation, does not that make all the water irrevocably and forever private property, without the power in any legislative body to change it'

Mr. Goddard: Yes; I think it does. I think the appropriation is a property right, and its regulation is within the control of the state. That is what I propose to claim.

Mr. Justice White: That is the very difficulty in my mind. You say its appropriation is in the control of the state, and you say it is a private right. If you state two absolutely conflicting things, I can not follow you.

Mr. Goddard: I did not intend to state them that way, and I do not see that I have. It may be possible, but I do not so regard it.

Mr. Justice White: I am calling your attention now to what was decided in the case in your court. Let us say, for instance, that here are a thousand people on a stream. A man goes to the mouth of the stream and appropriates, under your territorial government, all the water, so that here are thousands of people with the water flowing by them. It flows right by their doors. They can not touch a drop of that water; it all belongs to the man twenty-five, thirty, forty or fifty miles below on the stream.

Now, your Constitution regulates the use of the water. It says one relative use is more important to the public than the other. I understand that your Supreme Court has declared that those regulations are wholly impotent as to any appropriation of water made under your territorial government, because that was a private ownership, just like any other kind of property, and that the state was invested with the power of regulation as to that property?

Mr. Goddard: It has virtually decided to that effect, yes, sir, qualifying the proposition with this consideration—that the appropriation already made is for a beneficial use. Of course, a party can not appropriate the entire water of the river unless it is done for a beneficial purpose. When such an appropriation

is made, and the water applied for a beneficial use, it becomes a property right, we contend. No court and no legislation can disturb it.

I was going to say that the government, as the owner of the land—

Mr. Justice White: Would it interrupt you if I asked you another question? I do not want to break the thread of your argument. I have had occasion to look at this question somewhat, and this is the difficulty in my mind: (I state this, not for the purpose of interrupting you, but only that you may help me in the argument of this case.)

You say that the recognition of the right of prior appropriation necessarily means the destruction of the riparian ownership system—that it can not mean anything else. In saying that, how do you explain away the California system, where the right of prior appropriation and the riparian right co-exist, and are enforced by their courts as co-existing and possibly co-terminable rights?

Mr. Goddard: I explain it because California has adopted a modified riparian system. They have two seasons of the year there, one rainy and one dry; and they have a modified system of riparian rights, a doctrine that gives the riparian owner a right to absolutely appropriate the entire flow of the stream. That is what I have to say in regard to California—that it has adopted a modified riparian right, that entitles or enables the riparian owner to divert every particle of the water, if he sees fit. It has grown up and changed by reason of their climate and the conditions of that country; and so it is all over the western country. This doctrine has been modified according

to the conditions of the country and the needs and necessities of the people. I say that the government, owning all the land and the water as a part and parcel thereof, has a right to adopt any policy it sees fit; and that with 500,000,000 acres of arid land for disposal, it becomes a matter of vital importance whether the government can adopt and enforce this policy of irrigation, by which alone those lands can be made productive and salable. But however that may be, it has announced its policy; and we claim that under the doctrine of South Carolina vs. Georgia and Wisconsin vs. Duluth, the courts are powerless to interfere.

We also claim that the State of Kansas can not maintain this suit for the further reason that it is not competent for one state to interfere with the use by a neighboring sovereignty of the water flowing through its territory, and that this use can neither be regulated or controlled by the courts. This court has had frequent occasion to define and determine the relative powers of the state and the federal government; and the legislation that has called forth these decisions has resulted in the statement of a rule which we believe to be controlling of this judgment. It has frequently said that a state has an absolutely unlimited jurisdiction over all persons and things within its territorial limits; that the power of regulating and controlling such legislation as to such matters and things is as supreme and complete as though the national organization did not exist, except in regard to such matters and things as have passed under governmental control. As to those things, the state necessarily has lost all authority thereover.

(Thereupon, at two o'clock p. m., a recess was taken until 2:30 o'clock p. m.)

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## AFTER RECESS.

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ARGUMENT OF L. M. GODDARD, ESQ.—Continued.

Mr. Goddard: I was about remarking at the recess that this court has held that the state possessed absolutely unlimited jurisdiction over all persons and things within its territorial limits.

Mr. Justice Harlan: Unlimited jurisdiction?

Mr. Goddard: Yes, except in so far as that power was conceded to the general government. By the principle of the case to which I refer this court lays down that decision. It is the case of State of New York vs. Milne. That was an action brought to recover the statutory penalties against the master of a ship for neglecting to report the number and character of passengers landed in the port of New York. It was insisted and strenuously contended on the argument that it was a matter of commerce, and therefore within the exclusive jurisdiction and control of the federal authorities. The court refused to recognize that contention, but decided the principle which we contend. Mr. Justice Barbour, in speaking to that point, said:

> "That a state has the same undeniable and unlimited jurisdiction over all persons

and things, within its territorial limits, as any foreign nation where that jurisdiction is not surrendered or restrained by the Constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a state to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem to be conducive to these ends, where the power over the particular subject or the manner of its exercise is not surrendered or restrained in the manner just stated."

This doctrine has been extended so far as to become a common rule of real property; and we can see no reason why the same principle should not apply to the acquisition of title to and ownership and transmission of property in water as it does to realty. Under the principles decided in this court, we say that there is no reason why the state may not declare water to be property, either real or personal, as it may see fit, and may by enactment confer any right upon its citizens in and to any species of property.

Mr. Justice White: Suppose (though, of course, it is not a supposable case; but it may involve the principle, although I do not say it does) that the State of Colorado were to erect across the state line a factory, which would poison the atmosphere of a territory in which there lived 100,000 people of the State of Kansas, so that death and ruin would ensue to such a degree that that would be, in the law of nations, a *casus*

*belli,* and give rise between nations, under the principles and law of nations, to war. Is it your conception that there is no remedy under our system of government for that condition of things, and that destruction of life and the ruin of one community could be entailed by the other?

Mr. Goddard: Not at all, sir; I have not claimed anything of the kind. I say that a state can not be attacked in regard to its legislation, or held responsible for the acts of its citizens under its legislation. But I have not contended and do not contend that, if the State of Colorado, by its authorities, does the act which your honor suggests, it would not be restrainable. As I say, I have said at the outset that, as far as it invaded the property rights of another state, it could be reached and restrained by decree.

Mr. Justice White: That question came to my mind with reference to the statement, which was just made in your argument, that water could be made just as much the subject of private appropriation as any other property. Now, running water and air, so far as the right of ownership is concerned, are very much assimilated; and I asked you that question to try to develop whether, perhaps, there was not a fallacy in your proposition that running water was as much the subject of private appropriation as any other thing would be. I wanted to develop whether air, upon which people depend for their existence and their very life, was the subject of such appropriation that it could be taken by one set of people so as to destroy the lives of others, without any possible redress?

Mr. Goddard: Well, that is carrying it to the extreme. But, when we speak about a property in

running water, it is not property in the water itself; it is property in the user of the water, because the water is continually passing on. Where a party has appropriated a certain water right and applied it to beneficial use, and is an actual user of it, that gives him a vested right in that stream or that amount of water, although the particular water that he appropriated years ago has gone on down and passed away. But to the water as it flows in that stream he has acquired a right, which is not only a vested right, but a freehold right, as determined by the Supreme Court of Colorado. I say, then, that, in regard to property right in water, the state has the right to declare that water shall be property, real or personal, as it may see fit; and, therefore, its transmission, control and ownership are as much under the control of the legislation of the state as any other real property or other property.

Mr. Justice McKenna: And, you say, to the extent of taking all the water, so that none at all could run into Kansas?

Mr. Goddard: That is an absolute impossibility.

I say this, however: If the appropriation covers all the water of the stream, if it is for beneficial use, either agricultural, manufacturing or mining, and, if the entire amount of it is actually applied to that use, the party has a right to the water.

This map illustrates the fact that the case supposed by your honor can not be possible. That (indicating) represents the Arkansas river. It heads up here, and comes on down; and you can see by these marks where the seepage waters have percolated through the soil, in these places where it is colored

green. So that the water can not be prevented from flowing into Kansas. In fact, we increase the underflow in Kansas by appropriating water in Colorado. This map shows, from actual measurement, how the seepage waters come back into this stream. Therefore, the supposition is not a possible one.

Mr. Justice McKenna: But it does not test your principle. If Colorado can authorize the diversion of a gallon, she can authorize the diversion of a million of gallons.

Mr. Goddard: Yes.

Mr. Justice McKenna: If she can authorize the appropriation of a million of gallons, can she not authorize the appropriation of all the river? And, if she should exercise that right to appropriate all the water, what redress would Kansas have? Does not that appropriation of the whole river bring my question and the question put to you by Mr. Justice White into the line of this case—in answer to which question you said you could not justify it?

Mr. Goddard: I say that my claim would go this far: That a valid appropriation for beneficial use and an actual user gives the appropriator a right to use all the water.

Mr. Justice McKenna: Kansas has the same rights that Colorado has in these waters, has she not?

Mr. Goddard: I think the state has absolute control over these running waters, whatever the result may be to another state. It has a sovereign right. The doctrine of the right of a state to control the use of its water within its limits was but recently a matter of judicial determination in this court in U. S. vs. The Rio Grande Irr. Co. case. Speaking by Mr. Jus-

tice Brewer, the law was declared to be that a state had the right to control the waters within its limits, and devote them to any use it saw fit, and had the right to change the rule of common law riparian rights as to any waters within its limits, subject to the conditions that it might not invade the right of the government in the stream as the owner of land, or its power to maintain the navigability of such streams as were used for the purposes of commerce.

Mr. Justice McKenna: Then you answer is that Kansas would have no remedy at all?

Mr. Goddard: She would have no remedy at all in regard to that matter.

Mr Justice White: Your idea is this, then: Take the Connecticut valley, where a river flows partly in Massachusetts and partly in Connecticut, we will say. The State of Massachusetts could pass a law to take out all the water from the river, and leave the Connecticut valley, with its teeming population and great industries, in desolation and ruin, and there would be no redress under our system for the people of the State of Connecticut, because the State of Massachusetts has the absolute power to appropriate that water which, in nature, is not restful, but is forever running?

Mr. Goddard: Yes. I say that that would be a thing that conditions would very rarely justify; but I say that a state has the right, where the necessities exist, to provide that the running waters in its limits can be appropriated and diverted to nonriparian land for beneficial use.

Mr. Justice McKenna: Does it have any effect on the power, does it impugn the power at all, to say

what the effect is, whether it is greater or less? If Colorado has the power to the extent you claim, would not Massachusetts have the power to the extent, perhaps, of the question put by Mr. Justice White?

Mr. Justice Brewer: Do I understand you to claim that a state has a right to appropriate all the waters that flow through it and run into another state, so that none shall go into that state?

Mr. Goddard: Yes. I understand, under the doctrine of the Rio Grande case, that the state has a right to provide what use may be made of its waters; it may repeal the common law riparian doctrine, and may use it for appropriation.

Mr. Justice Brewer: Can the state, either by itself or by authorizing its corporations or of its citizens, appropriate all the water of a running stream so that none goes into the adjoining state? Is that your contention?

Mr. Goddard: Yes, sir; that is my claim, although I say, your honor, that it is an absolute physical impossibility. It can not be done; but I say that they can use the waters for appropriation and irrigation, and they will then go back and percolate through the soil and return to the stream in the underflow.

Mr. Justice Brewer: Well, it might transfer it to another state, if your doctrine is true; and if your doctrine is true, could not the succeeding state, by itself or through its corporations, build an enormous dam and flood the state through which it came?

Mr. Goddard: No; it could not do that.

Mr. Justice Brewer: Why not?

Mr. Goddard: Because that is increasing the servitude on the upper state, which can not be done.

Mr. Justice Brewer: It is increasing the servitude on one and not on the other?

Mr. Goddard: Yes. I assert that proposition as a matter of law—that the state has, under the doctrine announced by this court, if I can understand it, the power to legislate in regard to these matters; and the results, while they may be unfortunate, are nevertheless not justiciable by a suit of one state against the other.

Mr. Justice Brown: I do not quite see yet why the State of Colorado may not, by building irrigating ditches and a reservoir, or authorizing them to be built, impound the entire waters of a river before they reach the State of Kansas. They might do that, might they not?

Mr. Goddard: Yes; they might.

Mr. Justice Brown: Do you claim that that is competent?

Mr. Goddard: I insist, as I understand the doctrine of this court, that that can be done.

Mr. Justice McKenna: Let me understand you. Do you say that that can be done absolutely against any complainant, or only that it can be done against the State of Kansas as a complainant?

Mr. Goddard: If the right exists, it exists to the State of Kansas the same as it does to an individual in the State of Kansas, in a proper case, against the State of Colorado. I do not question that. But I say that the State of Kansas can not maintain this bill unless it maintains it on the ground of ownership of 127 acres of land 150 miles east of the Colorado boundary, and about 300 miles from the point where it is said the State of Colorado diverts the water.

Mr. Justice Harlan: Could you point me to the part of the bill which refers to that specific tract?

Mr. Thomas: Do you mean as to the state ownership?

Mr. Justice Harlan: Yes.

Mr. Thomas: Yes, I can do that. It is found in the fifth and sixth paragraphs of the complaint.

Mr. Goddard: I do not desire to encroach upon the time of my colleagues, and I have already taken more than my time. I thank the court for the attention it has given me.

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## ARGUMENT OF PLATT ROGERS, ESQ., ON BEHALF OF THE STATE OF COLORADO.

Mr. Rogers: If Your Honors Please—The proper examination of this matter involves considerable of a historical character, as well as a knowledge of prevailing climatic conditions; and, as I think your honors will perceive before the case is disposed of, turns upon principles pertaining to international law.

West of the 100th meridian, a territory practically one-third of the transcontinental portion of the United States, is an elevated region, which is traversed by mountains and occasional streams, which, because of its elevation, has not the rainfall which is common to the lower portions of the country. This is what is known as the arid belt of the United States. In addition to being arid, and as some recompense for that fact, nature has placed in the mountains deposits of valuable mineral. In the process of settlement of this country the discovery of gold in California prac-

tically caused a jump in settlement from the Missouri river to the shores of the Pacific. That jump covered the arid region. By a curious process, settlement then began to work eastward, and the discoveries in California were followed by the discoveries in Colorado, ten years later. It was found, as an incident to the mining conditions presented and to the agricultural conditions thereafter presented, that these localities must be a law unto themselves in many particulars. This country of which I speak was at that time the property of the general government. The mines were on the property of the general government. The streams ran down and across the property of the general government. The general government was concerned as an owner of property in the development of that country. It was a part of our so-called common heritage.

When it came to the development of the mining industries, it was found necessary, because of the peculiar conditions prevailing, and because of the peculiar industry, that the streams which theretofore had been accustomed to flow down in their natural channels should be diverted to points remote from the stream for the purpose of washing the diggings and extracting the gold from the soil. Out of this there was developed a question in law as to the right of parties to take this water for these uses, as against each other and as against the general government.

This government encouraged the prospector for gold. It encouraged the taking of water from these natural streams and using them for the purpose of mining, without which the industry would have failed.

Now, it may be said that at that period in the history of this country there were no private holdings

from the government, and that, therefore, certain conceptions (because they are nothing more or less than conceptions, as we shall contend) supposed to be incidental to the common law should not prevail within that jurisdiction. It was then announced by the courts that the right of taking the water of running streams to points remote from the streams should be recognized and sustained by the courts; and the federal government followed suit whenever the question was presented.

As this settlement moved eastward, with the discovery of gold in Colorado, we had the first glimmerings of agriculture in a country absolutely unfitted for agriculture in its natural condition—that is, in its natural condition without the aid of man. There was no rainfall sufficient to raise crops. There is, therefore, presented to-day in this country, the spectacle of one-third of your domain practically unfitted for habitation, unfitted for cultivation, unfitted for the sustenance of life, unfitted for the maintenance of a sovereign state, unless the water can be diverted and put to beneficial uses; by which I mean making it produce in lieu of what nature, under more favored conditions, does in the eastern country, and has done in England.

Therefore, as the country developed, a theory grew up—a concept, as I call it—absolutely opposed to the concept of the common law with respect to the status of running waters. It was considered that the common law, so far as it dealt with the status of streams in the arid region, was not applicable; and, as I shall contend hereafter, the entire relation of the adjoining land to water for the purpose of maintaining what is known as the doctrine of riparian rights

by the very necessity of the situation, by the history of the country, and the recognition of the general government, no longer prevails within the arid region. Whatever can be done in the use of water in accordance with this new conception may be done according to the opportunities that are given as a state lies near the head or near the foot of any given stream. That right may be exercised to the absolute deprivation of any state that is lower down on the stream; and a state has no cause of complaint, in this tribunal, or in any other tribunal, nor would it have a legal cause of warfare, by reason of the exercise of that right.

Mr. Justice Brewer: Does not that proposition amount to this—that, in order to transform the arid lands of Colorado into fine farms, you may turn the farms of Kansas into arid lands?

Mr. Rogers: It may, and if it does we contend for exactly that principle; and we will justify it by every principle of international law as it is applied with reference to the different states composing the American Union.

Colorado lies at the apex, often so called, of the American Union. It is at a point where many of the streams which flow through the lands below have their source. It is a happy circumstance in respect to Colorado that it is so placed that in its arid condition it has the first opportunity to use the waters that flow through it. When, therefore, the question was presented in this court, and when the question was presented in congress, there was a recognition—not exactly in the case as now presented, of course—of the principle for which we contend, viz.: That in an arid region the water which, under other conditions, might

be deemed as at common law an incident to the land over which it flows, and concerning which there may be certain property rights in the land owners, does not obtain; but that every drop of that water may be taken out and used beneficially by nonriparian proprietors and rights thereby be built up with respect to it, in derogation of the rights of the adjoining riparian owner, as they would exist at common law.

The Constitution of Colorado, which was adopted in pursuance of the enabling act of congress, in dealing with the subject of irrigation, makes as its first precise and absolute declaration the statement that the natural streams of the State of Colorado belong to the people of the State of Colorado, subject to diversion for beneficial uses.

What does that mean? It is in line with the conception that has grown up in the arid country and was recognized by all the courts and all the authorities, with the modification which I will hereafter notice, that the old riparian doctrine, which had its birthplace in England, no longer applied. It was a return to the ancient common law as laid down by Bracton, that water is *publici juris* and that the individual owner of land had no absolute right to the flow of that water across his land. We were simply going back to the original conceptions of the proper use to which to put running water. Should it be put to useful purposes, or should it simply serve the caprice of a person who desired to have it flow down through his land?

So that the Constitution of Colorado, adopted by virtue of the enabling act of congress, made the explicit declaration that the waters belonged to the

people of the state. That meant this—that the waters of Colorado are no longer subject to the riparian doctrine, as being an incident to the land which the riparian owner may insist shall continue, and that the water shall continue to run as it has been accustomed to run. On the contrary, as a matter of the highest public policy of the state, which has a right to preserve itself, the declaration was made that this water belongs to the people, and not to the riparian owner. But it belongs to the people how? In trust; in trust, to be used by whoever will attach his labor to the stream for the purpose of taking the water out and making the adjoining land fruitful to sustain life, to build up a community, and to make a state in the true sense of the term as used in this country.

Colorado has streams flowing into Kansas, into Nebraska, into Wyoming, into Utah, into Mexico and into Arizona. If our contention be not true, we are merely the highway through which the waters necessary for the fertilization of our soil shall pass, to be practically wasted into the sea.

It is not contemplated by the common law that the flowing of a stream through a piece of land is of any immediate, direct benefit. It has its value for domestic uses; but the very limitations that are put upon it at the common law deprive it of its highest uses, even under the conditions which prevail in England and in the eastern part of this country.

To go back a little more into the history of this country, Colorado as she now exists was, in a large measure, originally a part of the territory of Kansas. Time was when Kansas extended to the summit of the Rocky mountains, and took in a large part of the

subject in controversy to-day. She then, in her territorial condition, before Colorado had taken a step in a legislative way, first recognized that in that country a new condition prevailed. One of the very first acts adopted by Kansas was one which organized the Capital Hydraulic Company, and authorized that company to take all the waters of the Platte river and of Cherry creek, probably to the deprivation, you may say, of somebody below. But she did that in view of the situation presented; and that was the initial law upon the territory of Colorado, which has only been followed in principle by the announcement contained in the Constitution and in the laws which have been adopted by Colorado, looking to the use of the waters running through that state for beneficial purposes.

Mr. Justice Harlan: Does your argument apply as well to navigable waters as to non-navigable waters?

Mr. Rogers: Yes, sir; except as against the general government, as I shall show later on. I always qualify the statement so far as the interests of the general government are concerned.

Mr. Justice Harlan: So that a stream that is navigable through two or three states could be practically appropriated by the upper state, if it so desired?

Mr. Rogers: That is, so far as the lower state is concerned; not so far as the general government is concerned.

Mr. Justice Harlan: So as to break up navigation below?

Mr. Rogers: So far as the rights of the succeeding state is concerned, always, treating them as sover-

eignties among themselves; not considering them with relation to the powers that have been conceded to the general government, and which have not been reserved to the states, respectively.

Mr. Justice Harlan: If you refer to international law, international law would make that a good cause of war, would it not?

Mr. Rogers: I beg pardon; it would not. Kansas now, after forty years, for the first time, after we have developed this country, when the whole arid region is dependent upon the maintenance of this principle, in this bill challenges the justice of the theory and the practice and the policy upon which the development of the whole arid region is being founded. Kansas says, not only to Colorado,

> "You shall not take out the water for the purpose of irrigation as against what we claim to be riparian rights,"

but she says,

> "You shall not take out the water as against any other state lying beyond your borders, into which your waters run. In other words, your lands shall lie desolate, notwithstanding their needs, and notwithstanding all that you have done towards building them up;"

because we have not been idle. It is our very aggressiveness, the very spirit of subduing and making productive that country, that is the cause of complaint upon the part of Kansas.

We have been going on all these years with that condition prevailing; and Kansas now, as I say, sud-

denly presents this bill to the Supreme Court of the United States, alleging that a controversy exists between states. That is the reason she is here. While it is true that in the bill there are allegations to the effect that Kansas owns a small piece of land, and that Colorado on the other side has built its own canal, and that, therefore, Kansas is a property owner on the one side and Colorado is a proprietor on the other, the whole kernel, the whole essence of the bill, as your honors will readily perceive when you come to read the bill and the pleas supporting it, is the right of any state—not Colorado alone, but any state situated as Colorado is—to adopt such laws as would devote the waters running through that state to what it, in its sovereign capacity, conceives to be the highest duty to which that water can be put.

Mr. Justice White: Let me ask you a question. Your argument seems to me to involve—I do not say that it is so, of course—a premise which is absolutely fatal to its conclusion. You make as your premise the right of a state to make water the subject of private ownership, like any other property; and in the next breath you assert such inherent necessities in water as give rise to the governmental power to determine how and when it is best for the community that the water shall be used. Now, is not your premise destructive of your conclusion?

Mr. Rogers: Not at all. In the first place, I am not saying that Colorado, in the first instance, makes this water private. In the first instance, Colorado demolishes the private interest in the stream as a running stream, and erects in its stead a public ownership of that water. Now, that is the first step.

Mr. Justice White: No; the territorial legislation of Colorado made it subject to private appropriation like any other private property; and your Supreme Court has held that that is the case. I have been looking at the cases recently. One was the case where the power of the state was asserted to interfere with a man, and it was claimed that the water was his private property. In that case the Supreme Court of your state said:

> "This is not for the benefit of the public; you can not have this water. We have no more power to take this man's property away from him in that way than we have the power to take away any other property which he owns."

Mr. Rogers: I do not recall the case to which your honor refers.

Mr. Justice White: The court said,

> "If his right had been acquired after the adoption of the Constitution, he would have acquired it subject to the constitutional provisions; but it having been acquired before the Constitution was adopted, it is private property, and we can not touch it."

That is just what the court has decided.

Mr. Rogers: I have not read the opinion of the Supreme Court in exactly that way. I may have in mind the case to which your honor refers. If so, it was the case that went off because the man who

claimed to stand upon the right of appropriation for beneficial uses, under the doctrine of Colorado, was not, in fact, an appropriator. Therefore, the court let the case go upon what would be the condition as between those who were simply pleading as riparian owners. That also is true in the Bean-Schwab case, if your honor will bear it in mind, now pending in this court, which is made to turn very largely upon the peculiar conditions which obtain.

Is there any further inquiry about that matter?

Mr. Justice White: No; I beg your pardon—I did not want to interrupt your argument. The subject with which you are dealing is a very difficult one, and I am only putting questions which come to my mind.

Mr. Rogers: It is, as your honors must see, a very important subject; for whatever may be the rights of Kansas, whether we be right or whether they be right, it involves consequences of the most tremendous import to the arid portion of this country. If Kansas is correct in her position—that is, if the riparian doctrine prevails here—it also prevails in favor of every other state lying down a stream; and, therefore, there is not a river in the arid regions the water of which can, according to the contention of Kansas, be taken out and used for beneficial purposes to the deprivation of a lower riparian proprietor.

Mr. Justice White: That is upon the theory that the doctrine of riparian rights means what you think it means?

Mr. Rogers: Yes. However, I am not saying exactly what the riparian rights doctrine does mean. It has its qualifications as well as other things in law.

Kansas plants herself upon what she announces as the doctrine of riparian rights; and, in doing so, she feels practically compelled to go back to the law as announced concerning riparian rights before that law was subject to qualifications which have been imposed in practically every state in this Union, because of the fact that the common law, in many particulars, was not adapted to our wants and necessities. The riparian doctrine has been overturned, not only in Colorado, but in the eastern states as well, notably in the state of New York; and the common law has not been received and acted upon in its integrity in any state of the Union, and I might say not even by this court, I think, where there has been a question raised as to the policy laid down by the several states as to how far the common law should be carried in any particular case.

The common law, in its original principle, was simply this: That if a man owned land through which a stream ran, or owned land abutting upon a stream, that stream must continue to flow as it had been accustomed to flow.

Mr. Justice White: Where do you get that common law?

Mr. Rogers: I get it from Chancellor Kent, and the various authorities of the law, and the brief on the part of Kansas.

Mr. Justice White: I know what Kent says about it; but have you taken Blackstone's definition of it? I suppose that would be a pretty good authority as to what the common law was.

Mr. Rogers: Well, I have to assume that that is their position, because they so announce it; but I do

not consider that it is the law as applied to this country.

Mr. Justice White: You know this court declared, in the Holyoke case (I think it was the Holyoke case) that legislation of the state which regulated entirely the use of water for mill rights, and deprived some people of the right to use it, was a perfectly valid exercise of the power of regulation under the riparian rights at the common law.

Mr. Rogers: Yes. In the eastern part of this country these changes have all been in the form of modifications or qualifications of the common law doctrine.

Mr. Justice White: I should not say that.

Mr. Rogers: Well, I think they start with that as a sub-stratum. Your honor knows better about that than I do, however.

Mr. Justice White: I think they are a recognition of the common law, and not modifications of it.

Mr. Rogers: "Recognition" may be a better word to use; I accept your suggestion.

When I am speaking of the arid region, it is not to be said that the entire arid region has adopted the theory of Colorado. That theory has been adopted in all states that, throughout their domain, are absolutely arid. California, Oregon and Washington, that are in part arid and part humid, have not adopted the theory of Colorado; but they have builded upon, rearranged and differently applied the principles of the common law which grew out of the doctrine of riparian rights.

You will bear with me when I state what is known to the member representing California—that in the

early days, when the adoption of this theory was the subject of controversy in that state, it culminated in the Lux-Haggin case, which was a contest between the common law (that is, the doctrine of riparian rights) and this doctrine which we call the doctrine of appropriation to beneficial uses, which had its origin long anterior to the common law, and was based upon conditions very similar to those which prevail in the western country. That was a hard-fought battle. There were various interests concerned. But, after all said and done, the riparian interests were much the larger interests. It was a conflict between proprietors in the true sense of the term, taking water to land remote from the stream, by virtue of riparian ownership, and not as mere appropriators. Therefore, as a starter, California adopted the common law with respect to riparian rights. But what has been done since?

I refer to this matter because, as the finality of the whole business, we come down to the fact that, for the purpose of self-preservation, which is the right of a state, a state will finally conform its laws to its necessities. California, starting with the premise that the doctrine of riparian rights was, in a modified form, applicable to California, has inch by inch made such additions and amendments to and qualifications of that doctrine that to-day it can hardly be distinguished from the principle for which we contend. To-day, according to the very last announcement of the Supreme Court of California, an upper riparian proprietor may do what? At common law he could not take the water out for its consumption. That was denied—that is, according to the Kansas conception of the common law. But to-day he is allowed to take it

out, even to the extent of reaching to the utmost limits of the water shed in which that water flows, and that though it results in the absolute deprivation of the lower proprietor. The same law is now laid down in a very recent opinion by the Supreme Court of Oregon.

These are instances of a law that is the first in our existence—compelling us to conform ourselves to our surroundings. The native of Cuba, if he goes to the North Pole, has got to put on arctic clothing if he is going to live; and the state which goes into the arid region can not carry with it the doctrine of riparian rights if it is going to live. Therefore, they have changed these laws, imperceptibly, in some cases, but never so wholly as was done in the State of Colorado.

Now, can Colorado, situated as she is, make a declaration which in its principle may absolutely deprive the State of Kansas of every drop of water in the Arkansas river? That is the inquiry which was put a moment ago to the other counsel. I say she can, and upon principles that have never been questioned.

We speak about the injury to Kansas. That is a mere conception. There may be farms reclaimed that depend upon this water flowing down as it has been accustomed to flow; I do not know. But it so happens in the course of nature that what one man gains another measurably loses. There is no adjustment to give equality of rights. When nature fits the upper portion of a river for use in preference to the lower, their rights in that river being equal, he who is first in opportunity is first in right. That is a law which must be respected by this court if the integrity of an American state is to be maintained.

Colorado having made this declaration, it remains to justify it in law and in precedent.

It has been repeatedly stated by this court as follows: (I am not going to read anything to any extent, but I want to quote this much because it is the premise to this part of my argument.)

> "The several states comprising the American Union are sovereign as to all powers retained by them. A state, within the meaning of the Constitution, is a political community of free citizens, occupying defined boundaries, and organized under governments sanctioned by written Constitutions. Under the confederation it retains every power, jurisdiction and right not exclusively delegated to the United States, having all the functions essential to separate and independent existence. Their preservation, and the maintenance of their governments, are as much within the care of the Constitution as the national government."

Your honors have also said that in a controversy between states—I am speaking now in a general way, since when you come to their condition as states—they must be divorced of all questions of interstate commerce or of relations which would give the federal court jurisdiction of a cause where the citizens were citizens of different states—I am now speaking of states in their sovereign capacity, and it was that condition in which you spoke of them—in that respect it has been said by this court that a controversy be-

tween states must be determined by the same principles of international law which would have obtained if the states were not a part of the federal Union.

Now, how far has Colorado or any other state in this Union surrendered anything to the general government pertaining to this particular subject? So far as navigability is concerned, it is conceded that the general government has control of the navigable waters, and that she might interfere in such use of the water by Colorado as would restrict or impede navigation. That was the theory upon which you decided the Rio Grande dam case against the Territory of New Mexico, and very properly. But Kansas, starting out in her original brief with the theory that she was simply acting as the representative of the riparian owners who were remediless without her act, proceeded then upon the simple law that a riparian proprietor on a navigable stream had certain rights which were being interfered with by the State of Colorado. She has practically receded from that position, so far as the last brief is concerned, and is now attempting to place herself upon the basis of having a navigable stream within the meaning of her laws—I do not mean navigable in fact—running through Colorado and Kansas. If it be a navigable stream and is the subject of justiciable cognizance, then it is for the general government to be a party plaintiff in this case, as was the case in connection with the Elephant Butte dam obstruction of the Rio Grande river, not for Kansas to represent her citizens, as she claims, and also represent the general government. I imagine the general government can take care of itself without the aid or assistance of Kansas.

So that, so far as the navigable feature is concerned, there is nothing upon which to predicate any claim upon the part of Kansas; and moreover, while Kansas asserts that she has these rights to the stream as a surface stream and also to the underground waters, it is not alleged in the bill that the navigation either of the surface stream or the underground waters has been impeded by any action upon the part of the State of Colorado.

So that it comes right down to a mere question as to what the rights are in that river. But let us assume it to be a navigable river; because that gives me the cue to the argument which I desire to make in this connection. If it were a navigable river, the conditions now presented might be absolutely reversed. As a navigable river, Colorado might desire to navigate the Arkansas for the purpose of getting down to the Mississippi and so to the gulf; and suppose that Kansas should then turn upon us and put up her barriers and say:

> "No; while it does seem that according to the laws of nature you should have a right to navigate this stream, as a common highway, nevertheless we have put up our hand, and through the State of Kansas you can not go."

Would that be justiciable in this court upon any theory whatever?

Now, what is justiciable in this court in the way of controversies between states? I take it that that is what is spoken of when certain powers were reserved to the general government and certain judicial

powers were reserved to this court in respect to controversies between states. They said:

> "You have abdicated to a certain extent your sorereign powers. If you have controversies, you can not wage war; you can not have ambassadorial relations; you can not enter into the ordinary negotiations which are common to sovereign states; but you nevertheless have controversies, and as to those controversies they must be submitted to this tribunal for adjudication and settlement."

Now, what are the controversies that can be settled? Coming now to the principles of international law, these are the controversies which I take it were intended to be the subject of settlement in this court, by that law. You can not go to war about everything. There is such a thing as legal warfare, and international law in determining the question is about as firmly fixed in the judicial and legal literature of the world as the common law is, if not more so. International law says that certain things may be legal wrongs, and if legal wrongs by one state as against another, if they can not be settled by peaceable methods, they can be settled by the force of arms, and they are justified in settling them in that way.

Whatever may be thus settled, whatever is the foundation for a legal controversy, within the terms of the international law, is a controversy which this court has reserved the right to settle. If it is not such controversy, this court has no jurisdiction. Your

honors have said that in terms already, because associated with international law is the incident which pertains to the relation of states, that we call courtesy or comity. Courtesy or comity sometimes rises almost to the dignity of being a legal principle which might justly be enforced by law if necessary; but there is a clear line of distinction between those matters which are of right as between sovereignties and those which depend purely upon courtesy or the comity of nations. Your honors have said, as respects the situation of these different states,

> "Although comity is presumed to exist between the states, yet when, as must occasionally happen, the interest or policy of any state requires it to restrict the rule, it has but to declare its will and the legal presumption is at once at an end."

It might be comity for Kansas to allow us to navigate our bottoms over the Arkansas river throughout her territory. It might be comity for Colorado to allow the water to go down for the purpose of satisfying a conception which was borrowed from a country where the natural conditions were entirely foreign to those which obtain in Kansas and Colorado.

Coming to this question of navigation, then, would the right of Colorado to navigate the Arkansas, as a navigable stream, be one concerning which the State of Colorado, if it were prohibited, could legally go to war? I have examined all the authorities bearing upon that subject, and the consensus—there is no variation—of opinion, so far as that is concerned—the consensus of opinion both of American and for-

eign writers is that a state, however harsh it may seem, within its sovereign capacity, has the absolute and exclusive right of everything that does not pertain to the sea and the navigation thereof, and that as to innavigable streams it may consume that stream to the uttermost drop, as against the lower proprietor, and as to navigable streams, the lower proprietor may stop the upper from going through; and that both are legally justified by the principle of international law, which is the principle which must obtain between the State of Kansas and the State of Colorado.

Now, just a moment as to whether this contention of Kansas from her own standpoint can have any application. It will be noticed in the bill—and when I say the bill I mean the bill and its prayer—that there is no specific relief asked in favor of any particular piece of land along the Arkansas river in the State of Kansas, nor is there any specific relief asked against any particular ditch in the State of Colorado, so far as Kansas, as a proprietor, is concerned. The thing is taken in the lump, and the purpose of Kansas is to have the water come down without respect to any particular lands that would be benefited by the flow; and so far as the State of Colorado is concerned, it also is treated in the lump and the purpose is to reach it not by restraining any particular ditch, but to lay hands on the legislature that adopts the public policy of this sovereign state, and by staying its hands, prevent anything being done in Colorado in behalf of any land or any ditch which impairs the claim made by the State of Kansas.

What is the riparian law or the doctrine of riparian rights in the United States to-day that could be

made applicable, if your honors should go so far as to try to find something that would meet the situation? You will not find the common law adopted in the same degree or applied in the same manner in any three states in the Union. Every one has its shade of difference, and particularly in respect to this matter of riparian rights. In New York, when it came to a question of taking the water of the Mohawk river for the purpose of supplying the Erie canal with water, a lower riparian owner, whose power was about to be destroyed by this deprivation of water, complained, and the state of New York said in apt terms that the principles of the common law respecting riparian rights did not obtain when the public necessity in any given state denied its applicability, and they allowed the water to be taken from the Mohawk river, to the detriment of a mill owner, whose rights were thereby destroyed.

In other particulars we have repeatedly refused to apply the principles of the common law. Illinois refused to apply them with respect to stock running at large, and to the necessity of enclosing it, and so forth.

The Chief Justice: The statute covered that.

Mr. Rogers: I beg your honor's pardon. If you will permit me, in New York it is well known that the common law was adopted as near its purity as in any other state of the Union.

The Chief Justice: You said in Illinois.

Mr. Rogers: I say New York now. I am coming to Illinois. In Illinois they refused also to apply the principles of the common law where they themselves said those principles were not applicable to the condition then presented.

The Chief Justice: That is, the statute adopted the common law so far as applicable.

Mr. Rogers: The statute adopted the common law, but the court, when it came to it, said that it was adopted with these necessary qualifications. You have just that line of decisions in this very court. What I am contending for, so far as the decisions go, is not at all unfamiliar to this court.

Your honors have refused to apply the principles of the common law when it comes to a test of navigable waters. By the common law, navigable waters mean tide waters. Your honors have said that in a great country like this, with the Hudson river and the Mississippi and the Ohio, it is absurd to talk about applying the test of the common law for the purpose of determining whether they are navigable waters. They are not navigable waters at common law. You proceed upon that very theory. You refuse to apply the common law, and you say they are navigable in fact, and we will make the law so by our declaration. You have done it in other instances, which I do not recall just at this moment.

I think I have sufficiently elaborated this particular phase of it, although I have not gone into many details, which I think would at least throw some light upon the subject.

I call attention to this, which is also presented by this demurrer, that for forty years Kansas has lain by without raising a finger, and meanwhile the waters of the Arkansas river have been taken out above and reclaimed thousands and thousands of acres involving the expenditure of millions and millions of dollars. This irrigation is no trifling matter. It is just as

serious for one-third of this country as the navigation of the Mississippi or the Hudson, or your harbors, for the balance of the country. So that Kansas must have been conscious during all this time, not only that Colorado was diverting the water, but the whole western country was doing the same thing, and doing it not in her ignorance, but with the principles announced in the most flaring lines, in the Constitution of the State of Colorado, and with a repetition of that announced in the statutes of the United States in 1877, where, after providing for the taking of water for the reclamation of desert lands, the waters of the streams in arid America are devoted to public uses in almost identically the same language, and absolutely the same in principle, as is announced in the Constitution of the State of Colorado.

What does all that mean? I told you a moment ago that all this land belonged to the general government. This land to the general government, except for spots here and there, where there might be mines or something else, was valueless. So far as its great public ranges were concerned, they were open to the public without compensation whatever. What was the proper policy for this government to adopt with respect to this immense domain? To let it lie arid, and announce that it adhered to the principle claimed by the State of Kansas, that these waters should flow unvexed to the sea? Not a bit of it. The general government awoke to the situation and allowed the taking of these waters, for what purpose? That thereby the public lands might be disposed of, because the government was to get its $1.25 or $2.50 an acre, as the case might be, and it could not dispose of them if

they could not be made arable and responsive to the agriculturist.

Therefore, after having, in the Act of 1866, recognized these essential principles, in 1877, when it came to the desert land law, she flatly laid down the law that the lands of the United States in the arid region should be cultivated; and, therefore, said:

> "If you will take from these streams the water necessary for the irrigation of that land, apply it to that land and pay a given price per acre, or make a certain expenditure per acre, upon that consideration we will convey the fee of that particular land."

Mr. Justice White: Right there, if there is to be implied from the Act of 1866 a recognition of the Colorado system, and if these streams rise in Colorado, and she has asserted her right to take all the water, then your theory is that in order to make the arid lands fertile, they recognized the system which necessarily requires them to remain a desert? That is, they recognized the prior right of Colorado to appropriate the whole.

Mr. Rogers: You mean the general government recognized the right of ——

Mr. Justice White: An order was made that the effect of these acts is necessarily to constitute a recognition on the part of the United States of the provisions in the Colorado statute in the Constitution. You say that Colorado enjoys the fortunate position of being at the apex from which the streams flow. You said the Act of 1866 recognized that, and if the Act

of 1866 did recognize that, then the consequence was that congress, in the effort of making these arid lands fertile, has made them a desert and said they shall ever remain so, or else she has recognized the right of Colorado to keep all the water.

Mr. Rogers: Far from that. That is not a proper deduction to be drawn from those premises. This is the situation with respect to the general government:

> "There are lands which lie within this region where the right of appropriation prevails. If you will take advantage of that right of appropriation and apply the water on these lands, then you may get the title."

Mr. Justice White: That water can not get there unless it comes from Colorado.

Mr. Rogers: That is right, so far as Colorado is concerned.

Mr. Justice White: The argument made on your side of the case is that the Act of 1866 recognizes the right of Colorado to take the whole; so, in the effort to get water to the arid lands, they recognize the right of somebody else to take it all away from them.

Mr. Rogers: Your honor, if you will pardon me, I think, has not got that quite according to the way I want to put it.

Mr. Justice White: I know; I am trying to wrestle with the problem.

Mr. Rogers: This is the situation. You are speaking of Colorado all the time as though she made one lump appropriation. Colorado adopts a certain principle with respect to the water flowing in that

state, and then sustains the taking of water in accordance with that principle for the reclamation of her lands. The government of the United States, so far as its lands are concerned, could have come in there and in its order have taken out the waters of the Arkansas river for the purpose of reclaiming its land.

Mr. Justice White: If the principle I am suggesting to you is true, the government of the United States could not have done that.

Mr. Rogers: It stands in the same position as any owner of private land. Understand, I am not giving the government of the United States any authority whatever to come in there and take the water away from us or to establish any different codes of laws with respect to the use of that water. If she is going to use her land within the State of Colorado, being a non-navigable stream, she must do it in conformity with the rules, principles and declarations laid down by our Constitution and our laws. I refer to the actions of the general government for this purpose, which is the culmination of this part of the argument, to show that she has recognized the doctrine of appropriation as of the highest public policy in the arid West.

Mr. Justice White: I want to ask you this question, which is in my mind: A man goes under the desert land law and has a tract of land, and he appropriates the water that is on government land.

Mr. Rogers: Yes, sir.

Mr. Justice White: The water that comes down from that land comes from Colorado, that is, on government land.

Mr. Rogers: Yes, sir.

Mr. Justice White: A man goes into Colorado and appropriates all that water before it gets to that

land. What is the appropriation of the water under the act of congress worth?

Mr. Rogers: You are assuming he makes an appropriation in Kansas.

Mr. Justice White: I do not say in Kansas. I say in Wyoming, or some other state.

Mr. Rogers: Let us consider it now from two points of view.

Mr. Justice White: All the lands that have been taken under the desert land law, under the act of congress, are absolutely sterile and worthless if Colorado chooses to allow her citizens to appropriate all that water.

Mr. Rogers: It may be; yes. If the land belonging to the government is taken up in Colorado, then the rights attach as of the order of appropriation. If there are no waters in the stream, even in Colorado, no water could be had, because they had been taken up by prior appropriation.

Mr. Justice McKenna: Then, the policy of the act expressed in 1866 was only a policy for Colorado, that state which you say had the priority of appropriation?

Mr. Rogers: Not at all.

Mr. Justice McKenna: Why not?

Mr. Rogers: It was a policy, but every policy is affected or influenced in its operation by natural conditions. Now, it is the policy that the water may be taken from all of these streams, but what is there attached to that policy? First, that the right shall attach in the order of appropriation. The United States government does not say anything about that. But we attach it, and everybody else attaches it, and everybody recognizes it.

Next, that an upper appropriator taking out water has an advantage as against a lower one physically. Now, whether it has a legal advantage is the inquiry presented in this case. If the lower appropriator is in Kansas, as against an appropriator in Colorado, then the Colorado appropriator, if he is first in time, would have both an advantage in point of law and in point of physical situation, and the Kansas man goes dry.

Mr. Justice White: My question was, whether where the Colorado man was the second appropriator, not the first.

Mr. Rogers: Yes; we will assume that Kansas diverted this water before Colorado did.

Mr. Justice White: Yes; on government land, and under the authority of the act of congress, a man goes into Wyoming, or some other state, from which the stream flows through Colorado, and, under the act of congress, he appropriates the land and pays his money for it. Now then, under the Colorado law, after he has done that, a man comes along in Colorado and appropriates all the water for his purposes in the stream which flows down to this land. What becomes of the man's appropriation of the water under the act of congress below Colorado, which Colorado herself has taken away.

Mr. Rogers: He does not get any more water. He is in exactly the same situation as the Kansas appropriator.

Mr. Justice Harlan: How does he live, then?

Mr. Rogers: He leaves the place.

Mr. Justice Brewer: Did I understand you to say, in reply to a question of Mr. Justice White, that the Kansas man goes dry?

Mr. Rogers: He goes dry, which is not unusual in Kansas.

Now, the final incident. This is a matter of absolutism. There is no modification, gentlemen, to my view. It is that Colorado is sovereign in all respects, and that though some other state may suffer, it is damnum absque injuria.

Now, I was diverted a little bit, as we divert our waters occasionally out there, by the observation of one of the judges. I was about to say that Kansas has lain by for forty years. Forty years is a long time in the history of a country such as this, whose entire development has practically occurred within the last one hundred years. Knowing that we were doing all these things in Colorado, taking out the water, asserting this policy, fortified by the general government with respect to the policy—that is where the general government comes in to our aid and maintains the justice of our policy, to get rid of the riparian doctrine—she apparently acquiesced in our acts and policy. Now, the question is not as to different appropriators in different states. They are not involved in this. This is a pure question between a person claiming by the riparian doctrine as against an appropriator; and I am putting these two doctrines in juxtaposition; on the one side the riparian doctrine asserted by Kansas, and on the other the doctrine of appropriations asserted by Colorado. It is not a question between appropriators in Kansas and in Colorado, but whether the common law shall survive or the American principle which we have established of appropriation for beneficial uses shall be maintained?

For forty years, therefore, Kansas has lain by. That means something. Your honors have, in cases of controversies between states concerning boundaries, adopted a principle not from the common law, although it might have been adopted from there, but from the international law, the law of nations, that the peace and security of nations as well require that after a lapse of time the matter should be considered settled, as is applied in case of individual controversies.

Now, I have drawn from your decisions and from the principles of international law a principle applicable to this very case. Kansas says in her brief that the statute of limitations never runs against a sovereign state, and that she is not guilty of laches, and that there can be no loss of legal rights by virtue of delay. In the case of Kentucky vs. Indiana, where it was a question of disputed boundaries for some sixty years, and a certain boundary had been acted upon, your honors said that Indiana came too late with the claim, and that they were bound by the principle of international law, because they had slept upon their rights, which it was required should be established at the earliest moment.

I do not mean to say by way of criticism on the position of Kansas that a sovereign state is always bound, but a sovereign state that has a tribunal to go to (as these states have with respect to their justiciable controversies, and can have them settled the very moment the wrong is perpetrated) is bound to come into court at the earliest moment, just exactly as a private suitor; and that Kansas, upon the face of this bill, is concluded by the policy which we have

announced and which, by the way, Kansas has incorporated in her laws, and which has been in her laws since 1886, namely, that west of the ninety-ninth meridian the water may be taken out for irrigation in defiance of the rights of the people below, just as we claim to take it out in Colorado—all waters, whether standing or running; and thus, in addition to all the arid states concurring as to the true policy which should prevail, in addition to the government of the United States in its executive, legislative and judicial departments recognizing the true policy which should prevail, Kansas herself, twenty-five years before this controversy came up, nay forty years, because hers was the first act pertaining to Colorado that settled this principle, concluded herself, and is now too late to go into a tribunal that had as much jurisdiction of her case forty years ago as it has today.

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ORAL ARGUMENT OF CHARLES S. THOMAS, ESQ., ON BEHALF OF THE STATE OF COLORADO.

Mr. Thomas: May It Please Your Honors—I think the novelty and importance of the propositions involved in this hearing have been presented with sufficient clearness to justify me, as far as possible during the time that is left, in replying to the matters which have been urged in support of the bill to which the demurrer is here directed.

The question is unique, not only in its physical but also in its legal aspects. I think it may be safely said that of the numerous cases which have been

brought before this great tribunal by one state against another, this is the first instance in which an established policy, a great industrial system, the very life of a commonwealth itself, has been assailed as unlawful, and as something which, menacing the prosperity and welfare of another state, should be, if not destroyed, at least limited by the action of this court.

That system to which I refer was born of the necessities of the country where it found root and where it flourished. The common law, which has been the subject of so much discussion here, and which occupies so great a part of the brief of the State of Kansas, is chiefly important and valuable among all its other attributes by reason of its flexibility. It is adaptable to conditions which, perhaps, being unusual to the place of its birth, make some of its maxims, some of its customs and some of its practices not only unnecessary, but absolutely impossible. The first impulse which took the tide of immigration westward, as Judge Rogers said yesterday, was the thirst for gold and silver. The second and better impulse which always follows these migrations of hardy and heroic pioneers is the utilization of the more common attributes of the new country, which, after all, constitute its permanent worth and the basis of its permanent existence.

Hence, we claim that, notwithstanding the early ordinances of the territories of Indiana and of Missouri, and of the state of Texas, whose force has been urged here, they have given place to the imperious necessities of climatic conditions, a recognition of which and an adaptability of rules to which are absolutely essential to the institution of territories and of states

in the arid regions, without which they must exist, if at all, merely as limited dependencies, their great resources being impossible of enjoyment.

The system for wihch we are contending has been implanted in the soil. Rightly or wrongly, from an abstract point of view, it is there; and it has been there ever since the Anglo-Saxon has been there. It has been there ever since American enterprise has been there. And if, because certain ordinances which invoked and declared the existence of the common law for the humid regions of the Mississippi valley are to be stretched over a vast area of country which at the time of their enactment knew nothing except savage beasts and more savage men, and applied to the exclusion of the thing which has supplanted them and created these commonwealths and made them the homes of thousands of happy and prosperous people, then the little we may have to say will scarcely avail us.

If, on the other hand, there shall be a continued recognition of the right of a people to adapt themselves to their surroundings, mould their laws and policies to the demands of environment and to utilize the forces of nature for their own existence and for their prosperity, for the developing of the wealth of the country and providing the necessaries of life, then this bill should be dismissed.

We started out with, and we still maintain the general proposition that the State of Colorado either has the right to declare the waters of natural streams within its boundaries to be public property, and to provide methods for their appropriation, in which event its action is unassailable, or that it has not; in

which event its action can not be defended, provided the proper parties are before this tribunal to assail the right, which we deny.

Mr. Justice Harlan: You make no difference, then, between a stream wholly within a state and one that runs through it?

Mr. Thomas: None whatever. Any attempt to make any limitation upon this power involves us at once in the difficulties which our friends have encountered from the commencement to the close of their argument.

Mr. Justice Brown: Is it your argument that the law of Colorado should be applied in this case?

Mr. Thomas: My argument is that the law of Colorado and the Constitution of Colorado, both being the exercise of powers entirely within their jurisdiction, must be applied to this case.

Mr. Justice Brown: Granting that as between two riparian proprietors within the State of Colorado we should apply that law, does it necessarily follow that with respect to another state which has a different law, a law of its own, we should be obliged to apply the law of Colorado?

Mr. Thomas: No; I do not say that. In the first place, this question could not arise between two riparian owners in Colorado. The right there is not recognized. If there be a right in the state to the appropriation of the waters at all for lawful purposes—of course I distinguish between the beneficent use of water and some appropriation that is designed to create or necessarily creates some standing nuisance imperiling the existence of a state, the purpose being unlawful in itself—

Mr. Justice White: Pardon me just there. If Colorado has the absolute right to say that this water shall be subject to appropriation, that it shall belong to A, B, C or D, or shall be used in this way or that way, and if you recognize that much, is not your qualification wholly in conflict with the right that you recognize?

Mr. Thomas: I think not, sir. I think the state has a perfect right to give property in waters for *beneficial purposes.* I do not think it would have a right to endow its citizens with the power to pollute or poison the waters, if you please, which, after going out of the state, would produce incalculable and insufferable difficulties elsewhere.

Mr. Justice White: That is another thing.

Mr. Thomas: Suffice it to say, then, that the Constitution itself and the laws make appropriation and beneficial use a qualification of ownership; and the moment actual beneficial use is not exercised, that moment the water is subject to appropriation elsewhere.

Mr. Justice White: By somebody else?

Mr. Thomas: By somebody else. The two necessarily go together. Water rights can be and are frequently abandoned, either through misappropriation or the failure to use the water for the purposes to which it was originally devoted; and it is then subject to appropriation elsewhere.

Mr. Justice Brown: Then your case comes to this—that the state which lies at the head of the river, no matter how many states that river may flow through, has a right to impound the waters of that river and devote them to its own purposes, provided those purposes are beneficial?

Mr. Thomas: Provided that they are beneficial and essential to its existence and prosperity.

Mr. Justice Brown: But must we not look at the existence and prosperity of the states below you to some extent?

Mr. Thomas: To some extent, yes; but not at the expense of the state which is exercising its constitutional right and power.

Now, for example, suppose the state of Minnesota, or its citizens, owned vast tracts of timber at the head-waters of the Mississippi; or, if you please, the state of Pennsylvania at the head-waters of the Ohio; and that the citizens of the state denuded those forests by removing timber and selling it, in consequence of which the stored waters which the roots and the foliage of the trees hold in abeyance are let loose, resulting in enormous floods in the Mississippi and Ohio valley. I am not supposing now something that is imaginary, because our experience is that those floods frequently occur. Now, can Kentucky and Ohio, or Missouri—upon the Mississippi river, enjoin the state of Minnesota in one instance, or the state of Pennsylvania in the other, from cutting these timbers on account of the consequent damage to them? Would not the state's reply be: "We have this right by virtue of our ownership. We have the right to use and enjoy it; and the damage which you suffer, which we deplore as much as anyone can, is nevertheless a consequence which is not—"

Mr. Justice Brown: That is rather a case of indirect damages, is it not?

Mr. Thomas: Is not the other also? Wherein is the distinction?

Mr. Justice Brown: This is a question of remote damages. The other does not deal with the water.

Mr. Thomas: The only difference, if your Honor will pardon me, is that in one instance the complaint is that the water volume is lessened, and in the other that it is increased.

Mr. Justice White: But you are speaking of the cutting of timber. Timber is attached to the soil of Colorado, and if let alone would not go down into Kansas.

Mr. Thomas: No.

Mr. Justice White: But this water in the State of Colorado is flowing water.

Mr. Thomas: But if the timber is cut the released water overwhelms and inundates the state below, by reason of the fact that the waters, the snows, and so forth, are no longer withheld. I can conceive of no other instance that is so apposite to this. The damage is the same in both cases, but it is inflicted differently.

As a consequence we must claim, if this right exists at all, that it exists to the extent of making lawful appropriations for beneficial uses of all the water that is in the stream. Our friends upon the other side, it seems to me, by the positions which they have taken here assume, independent of their own statute, the justice of the position for which we are contending. The bill itself declares the right, for example, of Kansas to every foot of water in the river, and alleges that it has the right to every foot passing across the boundary line and flowing unimpeded and continuously into that state, and that our action has for years been and is a constant, menacing, irreparable injury, involving

practically the destruction of millions of dollars' worth of property, to say nothing of its conversion of regions in the valley below the state line into an arid waste. And yet they tell us in their brief, and in answer to the questions of your honors, that they do not want to disturb any ditch or any diversion that now exists. They are perfectly willing to bear all the irreparable damage that is being inflicted, and has for years been inflicted, but they do not want the state to exercise any right of appropriation, nor do they desire these licenses to be extended when they expire. That is the relief which they ask.

There is no license to expire if this right to water is property. As such it is exempt from lapse by limitation. It is indestructible. Any corporation may dissolve to-morrow; but does its property escheat? Can the legislature do what it pleases with it? On the contrary, does it not pass by legal succession, just as a water right, if property must pass by legal succession, if a corporation owns it and the latter shall expire by limitation?

I think we have both traveled outside of the record to some extent; but, perhaps, the court may take judicial notice of some of these things. I think that when the gentlemen say that they do not want to disturb any existing water rights, they state themselves out of court; for the user of water in the Arkansas valley has been going on for the past forty years, and has practically covered all of it; and if Kansas does not want or intend to disturb any rights which now exist, why are they here?

Mr. Justice White: I do not want to interrupt your argument at all; but will you answer this ques-

tion for me? Suppose the California water-shed system should be the one to be applied in Colorado for all the water sheds, for irrigation, for purposes of mining, or for whatever purpose you please. Would you then be interfering with any of the rights of the State of Kansas?

Mr. Thomas: If your honor please, the water-shed system is our system. There is not a solitary drop of water in the State of Colorado that is transported from one water shed to another. It has been our system from the commencement down to the present time. Our irrigation law divides the state into water divisions, with a superintendent of each to see to the proper distribution of water and prevent collision between appropriators; and each division is confined to its particular water shed.

Mr. Justice White: What I want to get at is this: If the common law rule were the water-shed rule, Colorado would not impinge upon the water shed? She might impinge upon the common law rule as between persons?

Mr. Thomas: She might impinge just as much as she has impinged—just as much as she is impinging.

Mr. Justice White: She would not impinge any more? She would have a right to vary the ownership within her own area by giving private rights; but if the water-shed rule were the rule, then under the common law Colorado would not be taking anything from Kansas?

Mr. Thomas: Why, of course not; and we claim that under the common law we are not taking anything from Kansas. I am obliged to the court for

calling my attention to that point; because I want you, in connection with it, to look at this map for a moment.

This map is made from the latest official reports of the geological survey. It shows in coloring the lands that have been irrigated. Your honors will notice down here on the Kansas line that there seems to be as much land irrigated at the point of departure of the stream from our state as almost anywhere else; while here on the Platte river (which is the source of the bulk of our irrigation), where, perhaps, two-thirds of the irrigated area of the State of Colorado is, you find as the river leaves the state and enters Nebraska, an enormous area of irrigated land. That land is irrigated by seepage waters passing below here, but in the same water shed, and appearing down here (indicating), so as to fructify instead of destroy the fertility of the valley. And if Nebraska's country was an arid desert in consequence, or threatened to become such—for this is the oldest settled part of the state; it goes away back to 1858 or 1859—she would have been heard from long ago by some kind of protest which, if not attracting judicial, would certainly have attracted the general attention of the members of this honorable court.

It is complained that we have no right to refer to the laws of Kansas. We say that we do not care, for the purposes of this case, what the original common law was. We say that in Kansas, as late as immediately after the admission of the state, at any rate, it was adopted so far as it was applicable to the wants and conditions of the people. It was adopted by the first legislature of the Territory of Colorado to the

same extent. I assert (and the gentlemen upon the other side can not answer except in one way, and that is by admitting it) that, ever since Kansas had an organized government, territorial or otherwise, she has necessarily, and by reason of the imperious requirements of the climate of her western portion, ignored and set aside the law of riparian rights, if it had any existence whatever; and from the time this land was surveyed, which was long after 1863, when these school sections are said to have been granted, from the time the settlers poured into that valley down to this hour, they have appropriated water. They have been obliged to appropriate water, and they must continue their appropriations if they are going to stay there. And when it is decided that they can no longer do so, then, indeed, will that section become depopulated, and perhaps revert to its normal and original arid conditions.

(At this point a recess was taken until 2:30 o'clock p. m.)

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## AFTER RECESS.

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ARGUMENT OF CHARLES S. THOMAS, ESQ.—Continued.

Mr. Thomas: If the court please, before referring to the statutes of Kansas upon this subject (with which I wish to deal, in reply to the query made by his honor, Mr. Justice Brown), I desire to refer a moment to an inquiry that was made yesterday as to whether, if the law of riparian rights exists every-

where in the section under discussion, there could be any use at all made of water. That question presented itself very forcibly to the Supreme Court of the Territory of Colorado in the case of Younker vs. Nichols, being the first Colorado case upon this general subject, and a pioneer case upon the general question.

There it was pointed out, among other things, as a reason for the rule, that a riparian owner himself is helpless, under the application of the old common law doctrine of riparian rights, as it was there applied. If his stream is good for nothing except as it may fructify his land, he must go above it in order to obtain a sufficient fall for his ditch to convey the water, so that it will cover his land away from the bed of the stream, and he must go below, upon the land of his neighbor, for the purposes of returning it, or letting it run upon the land of his neighbor below and possibly overflow it.

Hence, the application of the doctrine to any large extent, even where it is recognized, as it is to a modified degree in California, brings endless complications, to which I will refer a little farther on.

I was, at the adjournment, about to refer to the laws of Kansas upon this subject, for the purpose of demonstrating that Kansas, yielding to the same conditions which are our environment, has necessarily and properly acted in the same way that we have; and to the reply, "What is that to Colorado?" I shall endeavor to show a little farther on.

I maintain, and I think the statutes of Kansas, certainly the action of its people, will bear out the proposition that from the time practically any lands west of the ninety-ninth meridian of longitude have

been inhabited, the right of diversion and appropriation of water, to the exclusion of the so-called riparian owner, has been recognized and practiced. There is a series of laws upon the subject, some of which we have quoted from, and to all of which we have referred. This map shows, among other things, the position of the ninety-ninth meridian of longitude. It is the direct line there drawn; and from that point to the Kansas west boundary line is a distance certainly of not less than one hundred miles. It is really more than that, but, for the purposes of this case, it may be said to be approximately one hundred miles.

The riparian tract owned by the State of Kansas and described in the complaint, upon which is its Soldiers' Home, is near Dodge City, which is at that point (indicating), a long distance to the west of the ninety-ninth meridian and many miles east of the western state boundary line. The reformatory, which is not riparian under the definition of that term, given by the Kansas counsel, is to the east of the ninety-ninth, but west of the ninety-eighth meridian, to which the Act of 1895 carries the irrigable area for which water in Kansas may be appropriated.

I now call attention very briefly to the opening section of the Kansas Act of 1891; and I want to say, by way of preface, that it goes farther than any irrigation or appropriation statute of which I know:

> "In all that portion of the State of Kansas situated west of the ninety-ninth meridian, all natural waters, whether standing or running, and whether surface or subterranean, shall be devoted to irrigation * * *

and may be diverted from natural beds, basins or channels for such purposes and uses."

The distinguished counsel for Kansas who last took his seat, believes that the water-shed theory of riparian rights, or the California theory, might be good; and yet the State of Kansas, which he represents, has given to the public this right of appropriation without any limit whatever, and has applied it to all sorts of waters, so long as it is in its natural condition, and no matter how or where it is, if found and appropriated west of the ninety-ninth meridian.

If it be said by the State of Kansas that we have not the right to appropriate all of the waters within the State of Colorado belonging to the Arkansas river, what shall be said of the policy of Kansas, which has given the right of appropriation of all forms of water within or without the valley of that river west of the ninety-ninth meridian? If we can not, by virtue of the operation of our statutes and our rights, take all of the water from Kansas, can Kansas, by limiting this law to a portion of its territory, with equal facility deprive states lying below it of all such waters and deny our right to do the same thing, that its supply may be enlarged?

This "brotherhood of farms with a common ancestry" is a very good thing in theory; but in its actual practice by the State of Kansas it has been found wholly and absolutely untenable if the western portion of the state is to be populated or developed at all.

But there is another feature of this statute to which I wish to call attention, since it indicates that

there has never been any recognition of any riparian rights whatever, but the right only of other appropriators of water; for the same section provides that no such diversion shall interfere with, diminish or divest any prior vested right of appropriation—not any prior right of riparianship, but any prior vested right of appropriation for the same or a higher purpose without condemnation and compensation—a recognition by the law of previous appropriations and a recognition of property in such appropriations, and a consequent provision for condemnation before it can be taken.

Our contention is that this statute, being one of a series, demonstrates not only that no riparian rights exist or existed in Kansas, but that if they did they have long ago been divested by the acts of her legislature, of which her citizens have taken advantage, and under which they have made appropriations of every drop of available water in the western half of the state.

The legislation of Kansas is the business of Colorado to this extent: that a bill which states a cause of action must also state an injury flowing from it; and if it appears upon the face of the bill and from those things of which the court will take judicial notice and of which the statutes of the state form a part, that the injury complained of can not result from the acts alleged in the bill, but flow from conditions for which the defendant is not responsible, then, independent of any question of abstract equity, the bill must be dismissed.

Applying that principle, we find the Kansas reformatory approximately 100 miles to the east of the

extreme eastern point from which there can be or has been any possibility of the diversion of water in the State of Colorado. Now, the gentlemen tell this court that a canal taken by the State of Colorado at Canon City, 250 miles to the west of the western boundary of Kansas, can and does inflict irreparable injury to the riparian right of the State of Kansas upon that little piece of property of which there is so much complaint here, when for the hundred miles immediately to the westward of it her own citizens can take, and have taken, and have appropriated all water, running water, subterranean water, and still water, and applied it to the cultivation of the soil. And if we apply that proposition to the property in Reno county, where there is no riparian right whatever, if we are to take the definitions of that right which have been given by counsel as our guide, what shall be said of their claim that the alleged damage to the property of the State of Kansas flows from or is in any manner connected with the acts either of the State of Colorado or any of her citizens? And if it does not, what becomes of this bill?

I say that counsel can not and will not successfully contend that the injuries inflicted upon private corporations and private individuals in the State of Kansas can be magnified to a cause of action against the State of Colorado merely because they have been espoused by the State of Kansas. They can not be magnified into a controversy between states, when in the first place the act of the state itself is not the cause of the injury, and in the next place the damages are entirely nominal or confined to individuals.

I think it may be said with perfect truth that if this action depended merely upon the property hold-

ings of the State of Kansas which are claimed to be damnified by the conduct of the State of Colorado, this suit never would have been brought. That is merely the cover (and I use the term in a perfectly respectful sense) to the broader and more sinister purpose of the bill, which is to deny our right to this water in order that the Kansas appropriations may be increased. In other words, we have the denial on the one hand by Kansas of the principle for which we contend, and its assertion on the other by legislation of the state that has been in force for years, and by a practice that preceded for many years the legislation itself.

I might now answer the query of his honor, Mr. Justice Brown, by asking whether the rights of Colorado and her citizens are to be adjudged and adjudicated by the law of Kansas? For my part I am perfectly willing in this case that they should be, provided the courts of Colorado may construe them; for if the invisible line between the two states——

Mr. Justice Brown: We can not give a preference to the law in one state against that in another, can we?

Mr. Thomas: I think not.

Mr. Justice Brown: You think we should throw them all back on the common law?

Mr. Thomas: If the common law exists in the particular country; but it never has, as I have stated, and as we show, existed so far as riparian rights are concerned in either as to the lands that are in controversy. If the state line were wiped out politically, so that we became a part of Kansas, we could do everything which we have done and which we are

charged with doing under the laws of Kansas, and by her laws take every drop of water in the Arkansas river, from its head-waters above the city of Leadville down to where the imaginary line exists.

We could, by the obliteration of the state line, if the contrary proposition is correct, take everything; whereas, now, upon the theory of my friend upon the other side, the unfortunate individual who may live within ten or twenty miles of the Kansas border, to the west of it, must see his lands go dry, while if he were twenty miles on the other side he could utilize all the water he needed.

It seems to me that so far as the question of the division of rights is concerned it is purely an imaginary quantity, and state lines have nothing to do with it. We fall back, then, upon the general proposition which we have asserted, that a system that is necessary to the existence of the people must be lawful, but its necessity is the measure and the limit of the right. And inasmuch as the use must be beneficial in order to correspond with the necessity, the principle of necessity has been, and must be, recognized as the measure of the right so long as the uses continue and so long as it is beneficial.

I think these reflections demonstrate, as they ought to demonstrate (although I had perhaps better refer to the decisions of Kansas upon the subject), that Kansas occupies the same attitude with reference to this river that we do; and I might here refer to the claim of this river being navigable—"officially navigable," as Judge Ware says; navigable in a Pinaforian sense, but one which nevertheless gives Kansas some right, the existence and character of which must

have occurred to counsel since they prepared and filed their bill. There is nothing in this bill which alleges the ownership of the bed of the river by the State of Kansas. There is nothing in this bill to show that the river was ever meandered. There is absolutely nothing concerning navigability in the bill except the mere statement of the fact. But when confronted by their argument, we are told, first, that Kansas owns the bed of the stream because it has been meandered and because it is navigable, and that she has a right, in trust for the public, to all the waters that flow therein.

Concede that for the sake of the argument, and let me ask how has Kansas exercised that trust?

She has diverted, or at least has given her citizens the right to divert, from this trust fund this flowing water—every drop of it. She has given them the power (and she had a right to do so and she ought to have done so) to take every drop of this water that she holds in trust for the public and extend it over her plains, in order to make them fruitful. It seems to me that the trustee here shows a remarkable neglect of the duty which her counsel declares to result from the existence of the trust, if it be one, by the practice of her citizens by the laws to which I have called attention, and by the decisions to which I will now refer. I may add that if this river is officially navigable in Kansas it is officially navigable in Colorado; and if the Kansas trustee may divert all of the water from its trust, may not Colorado do the same? And if she does the same may she not say so, and charge practically that Kansas comes not into court with clean hands—whether from the absence of water

or from any other cause makes no difference; the principle itself applies.

The case of Koen vs. Klein, 65 Pacific, 684, is a Kansas case, in which the Supreme Court say:

> "In view of the fact that the legislature of Kansas has in so many ways recognized the principle of irrigation and bestowed upon companies organized for that purpose so many rights, we can not hold that sections 1326 and 1327 take away from such companies all their characteristic rights as promoters of a public use."

That is the last declaration of the State of Kansas upon the subject. One made a few months before, and reported in the 64th Pacific Reporter, 62, being the case of Campbell vs. Grimes, decided this proposition. I am reading an extract from page 56, giving a part of our comment as well:

> "The right of the upper claimant to the exclusive use of such water as was actually needed for irrigation was conceded, but the court held that if any doubt existed at common law of the right of an upper riparian owner to appropriate all the water flowing through his land, 'whether necessary to his reasonable purposes or not,' there can be no doubt now that he has no right as against a lower proprietor to appropriate any more of the stream 'than is needed for his own beneficial uses.'"

Of course, the converse of the proposition, and one that is recognized by our courts everywhere, is that to the extent of the beneficial use the prior appropriation is good under the laws of the State of Kansas, and necessarily good, as against any alleged riparian right.

A word with reference to the California doctrine so frequently referred to in the course of the argument.

I may say that the latest work upon the subject of irrigation, that of Works (I do not think it is yet in the library; we sent for it and were unable to find it) shows from a citation of the authorities, as well as one of the latest reports of the Interior Department, the hopeless tangle in which a people who are dependent upon these water appropriations for their prosperity and for the cultivation of their lands find themselves by endeavoring to reconcile the doctrine of riparian rights with this right of appropriation. The California Act of 1887, I think, is one which establishes irrigation districts, and makes appropriations practically upon the same lines as they are made by the laws of the State of Colorado and other states, but enabling the people as a community to vote for the issue of bonds for the payment of the construction of works of irrigation, and taking such waters as may be necessary for that purpose.

Just at one point of the argument yesterday the attorney-general was asked a question as to whether, in his judgment, the defendant was entitled to the use of any water; and he replied very candidly that it was. The query was at once naturally suggested to everyone, "How much? If we are entitled to some of the water of the river, how much?"

Judge Ware wants this court to answer that question. As usual, Kansas does not know exactly what she does want. She concedes to us something. We are entitled to some water; but to how much? That question has not been answered, and it can not be answered; and with all due respect to this court, I contend that it can not be answered by the court, if it should assume to resolve itself into an irrigation commission for the purpose of determining and adjusting this right between the citizens of the two states.

Are we entitled to fifty per cent? Judge Ware says we are entitled to the flood waters. But flood waters are there but for two or three months in the year. Must we starve or perish by reason of the fact that we can only use the flood waters, while Kansas takes the normal flow? And if fifty per cent. (we will say for purposes of illustration) is good in 1902, how much are we entitled to in 1910?

Mr. Justice Harlan: How much do you think you are entitled to?

Mr. Thomas: We need all the water that is there, if the court please; and if a kind Providence would multiply it tenfold we could utilize every drop of it.

Mr. Justice Harlan: And make the river dry below?

Mr. Thomas: It does not make the river dry below.

Mr. Justice Harlan: But I say if that were the consequence?

Mr. Thomas: If that were the consequence, yes, sir. There can be no limitation to the right if it exists.

Mr. Justice Shiras: In some of the western states, I believe, they have provisions made for appropriating the waters of a running stream between those who abut on it. For instance, there was a case that was brought to this court from Utah where there was a conflict between persons above and persons below on the stream; and the statutes had provisions whereby the extent of the flood of the water at different seasons and the ordinary flow of the water was apportioned by an adjustment provided by statute.

Mr. Thomas: Every arid state and territory in the Union, if your Honors please, has, and must have, those regulations.

Mr. Justice Shiras: That seems to show, then, that there is a method—whether we can get at it or not I am not saying—whereby legislation can address itself to this subject.

Mr. Thomas: There is a method.

Mr. Justice Shiras: Now, if there is no common legislation between two states, can this court or not take notice of the fact that it is practicable to make an equitable division of the flowing waters of the state?

Mr. Thomas: No, sir; no, sir; because it depends upon priority. State regulation is necessary in order to adjust priorities, and especially during times of low water, during dry seasons. As it was once said facetiously, in some parts of the United States intoxicants are the cause of a great many homicides, while in the arid regions water takes their place as the subject of provocation. As a matter of police regulation the states must and do interfere and regulate distribution according to priority, especially in times of low water.

Mr. Justice Shiras: As I understand these statutes to which I refer, they do not go on the proposition that the one above has all the right to all the water.

Mr. Thomas: No, sir; no, sir. The oldest proprietor is first in right when the water is scarce, and then the second, and then the third. These appropriations have all been adjudicated by the courts, so that they stand in line of judicial priority and determination. I can conceive, if your honors please, how congress might pass an act regulating the entire subject as between states, and regulating appropriations in Kansas or appropriations in Colorado according to priority.

Mr. Justice Harlan: Under what clause of the Constitution?

Mr. Thomas: I do not know; I have not examined it. I can conceive of its possibility, however. That question has just been presented to me. I do not know that it is within the power of congress to do so. If congress has not the power to do so, however, it does not exist at all. There is then a hiatus in our form and scheme of government.

The Chief Justice: Congress could consent that the states should arrange it by agreement, could it not?

Mr. Thomas: That is possible; but for the purposes of this case I may say that there is no such method of regulation now in existence. Each state must regulate for itself.

Mr. Justice Shiras: Your contention, then, is substantially this—that the state that has the advantage of the situation, by being above on a flowing stream, has no relations of obligation whatever to the state below, unless that obligation only arises after the state above has taken all the water that it wants?

Mr. Thomas: If it is taken for beneficial purposes; yes, sir. The injury which follows is then damnum absque injuria.

Mr. Justice Shiras: Of which that state itself must be the judge, as I understand?

Mr. Thomas: It must, in that as in all other matters of internal policy, just as was the case with the state of Texas in the legislation of which Louisiana complained, and which had reference to the regulation of its harbors, its commerce.

Mr. Justice Brewer: Is there a correlative right on the part of the lower state to build a dam and flood the upper state?

Mr. Thomas: If the lower state, by the building of a dam, impounds the water, it has the right to do so, in my judgment; but if it invades our territory, then it must utilize our methods of condemnation for the purpose of securing the land.

Mr. Justice Harlan: In that case would your state have a standing in court itself?

Mr. Thomas: I do not think so. It might in its own courts; it might, possibly, but we would not try it. Kansas can not do that too quickly to suit us. All of the water that it can prevent flowing through Kansas we can utilize for the purpose of increasing the resources, prosperity and wealth of our state.

Mr. Justice Shiras: So that if by some convulsion of nature the current of the Arkansas river should be turned back so as to run out of Kansas into Colorado, Kansas could take all the water and would be under no obligations to Colorado?

Mr. Thomas: Yes, sir; yes, sir. According to the allegations of their complaint the stream changes

every time the flood waters come down, so that the ownership of the river bed is in one county to-day and another to-morrow. Those things occur.

It has been suggested by my co-counsel that there is another answer to the question of the possibility of regulating these matters between states, and that is that they can not well be adjused, because in one there is a contention of riparian rights, and in another a contention for the rights of appropriation; and there can be no reconciliation of those two propositions. They are absolutely irreconcilable, as the experiences of California have demonstrated, and as they will continue to demonstrate until they recognize the fact that they can not co-exist.

The hopelessness of answering the question as to how much water we are entitled to seems to me to be the more apparent as counsel discuss them. For instance, Judge Ware says that the old doctrine, "Water runs, and let it run," will apply. If that should be applied in the first instance, it would be opposed to the statutes and the policy of Kansas. In the second instance, if it should be applied, what good is the water to anybody? It then becomes useless. It simply flows according to the arrangements that nature has made for it; and, passing from one state to another, it simply becomes useful by reason of the effect that it may have upon the atmosphere, and so forth.

But it is suggested now that we ought to have enough of it for domestic purposes and for stock. But suppose that our stock interests will grow so largely as to require the entire waters of the Arkansas river to provide, first, for domestic purposes, and particularly for the great cities that are growing upon its

banks within our state; and, secondly, for stock, which interests are increasing? It is hardly a supposable case, to be sure, that there should be a necessity based upon those grounds for all of the water there. It is, however, at least as supposable a case as a great many of the propositions that we have discussed. Then it would be complained on the part of Kansas that we would be growing at her expense, and she would invoke the fundamental principle that one commonwealth can not prosper at the expense of another; and this court would be asked to diminish our domestic uses and to tell us how many cattle and sheep we might raise in Colorado, in order that the normal flow of this river might go on in the State of Kansas unimpeded and undiminished.

Coming back now to the question of underflow:

I might add, first, that there are some other features of this bill which seem to me to have been abandoned. For example, it is stated, among other things, that the high plateau country not embraced within the valley known as the Arkansas valley is a great range for cattle, which need the use of this stream for water, and so forth, and that that industry is being seriously injured if not destroyed by the misappropriation of this water. We have heard nothing about that in this argument, except in a general way. Judge Ware says that in his opinion the people of Kansas have the right to the use of this water for any herds of cattle that may be found within the valley or near to it. I ask how, if the law of private ownership exists, that right can be exercised wherever the private owner sees fit to deny its exercise, either by fencing in his own land or by declaring that its use by outsiders is prohibited under the doctrine of riparian right?

So far as the question of the diminution of revenues is concerned, I shall take up but little time in the discussion of that proposition. It may be true, and for the purposes of this argument I suppose it may be taken as true that the action of the State of Colorado in the diversion of the waters of the Arkansas affects the revenues of the State of Kansas in the diminution of taxable property. I do not know to what extent the law of judicial notice may go. If the census returns, recently compiled under official sanction and from official sources, are to be considered at all, they show a practical growth, not only in population (with the exception of one or two counties), but also in wealth and area of land cultivated in these counties.

But this court has determined in the Texas-Louisiana case that the indirect consequence of diminution of revenue by reason of the action or operation of the laws of another state gives this court no jurisdiction, and gives the complaining sovereignty no right of action. So that as far as that is concerned, I shall pass it by a mere reference to that decision.

Much has been said about this underflow; and when the subject was mentioned yesterday by the attorney-general, or, perhaps, this morning, his honor, Mr. Justice Brewer, made an inquiry as to whether there was any principle of law applicable to a so-called underflow which was not a defined stream.

The answer was that this stream is defined; perhaps it is; but it is not defined in the complaint in this cause. An amendment was filed to the complaint which is marked "23½;" in my copy it is a loose page. I will read it:

"That by reason of the diversion of said waters, as herein described, during the summer season and during the dry portion of the year, when there is neither rainfall in the State of Kansas nor melting snows in the State of Colorado, the bed of said river in the State of Kansas above the city of Wichita becomes practically and oftentimes wholly dry."

And, I will add, as a historic fact, it always did; and until climatic conditions change it always will. But (I state this upon hearsay, but upon good authority) there is one peculiar physical condition, as the result, in all probability, of the extended areas of irrigation, and that is, that the descent of water back to the stream makes the point of the disappearance of the water in the stream, in the dry seasons, travel eastward.

Mr. Justice White: State that proposition again, if you please.

Mr. Thomas: That is simply the statement of what I understand to be a fundamental fact. These streams all go dry at some time every year, unless it is an extraordinarily wet season, at some place; that is to say, the current becomes entirely subterranean. Since the extension of areas of irrigation, particularly upon the Platte, where the areas are so much greater, the point of disappearance of the water in times of dry season travels eastward; so that as it is now, we will say for purposes of illustration, ten miles farther east than it was ten years ago. The return of the water by seepage below the point where the ditch ends

seems to increase the flow to such an extent as to make the area of perpetual surface water travel eastward.

> "The bed of said stream through the territory above described is without high banks, and in its natural condition was but a few inches or a few feet below the bottom land adjacent thereto."

Perhaps for this reason Judge Ware qualified the navigability of the stream by stating it was "officially so."

> "These adjacent bottom lands are of a loose, sandy loam, and are unprotected on either side by hills or mountains or by any natural forests; and the bed of said stream is almost wholly of sand. During said dry portion of the year said territory is subject to high and constant winds, and said winds change and fill up the bed of the stream and the natural channel thereof with drifting sand, dirt and debris, until it is practically level with the lands adjacent thereto, and said obstructions are rapidly becoming permanent by growing vegetation, willows and trees."

And this in a land where vegetation, it is claimed, does not grow by reason of the unlawful conduct of the State of Colorado!

> "And at the times of sudden and excessive rainfall in the State of Kansas, or sudden or excessive melting of snow in the State of Colorado, the flood waters thereof do not

and can not flow down the natural channel of said river, now filled and obstructed as aforesaid, but overflow said adjacent bottom lands, washing channels therethrough, depositing dirt and debris thereon, and doing great damage to stock pastured, crops grown and improvements situate thereon, greatly injuring and decreasing the value of said lands."

Yet counsel say that such a valley is so defined, so bounded that the eye can tell where the area of underflow begins and where it terminates, when the bed of the stream itself is but a few inches below the adjacent country, but frequently changes; whereby (applying the Kansas doctrine of riparian rights to this river) the man who to-day is a riparian owner becomes to-morrow, by reason of the change of its bed, deprived of all riparian rights whatever, and the man who was injured last year by the unlawful conduct of Colorado, which interfered with his riparian rights, finds himself substituted for a neighbor in some other county, who had the river then, but who finds himself, through the caprice of the river, succeeded by a neighbor, claims that his riparian rights are being ignored and his property ruined by the acts of Colorado.

Under this description in the bill my contention is, that being the condition of the valley in which this underflow is claimed, no case can be found in the books which justifies the proposition that diversion of water from such an underflow is actionable or legally injurious.

To my mind this matter becomes comparatively unimportant, because, if we can not divert the sur-

face water, we can not injure the underflow, and if we can divert the surface water, then the other injury is merely consequential.

But, according to the statement of Judge Ware, this area of underflow is not only undefined laterally, but it is undefined vertically; for he tells this court of an instance in which a locomotive left a bridge, and, plunging below, descended into unknown depths and never yet been found. That is absolutely true. The incident was duplicated in my own state a few miles east of the city of Denver some years ago. But it seems to me somewhat of an anomaly, to say the least, to come into this court and show that practically there is no bottom to this land, while insisting that it is what is called bottom land, with well defined lateral and vertical boundaries, containing an underflow to which Kansas is entitled and of which the defendant is depriving it.

Now, water not only runs, but it runs down hill. It runs vertically, if conditions permit. It seems to me that it is carrying the right of action of a sovereign state against another very far to complain of the appropriation of an underflow that is so far below the surface of the ground that a railway engine, plunged into this moist and friable and fathomless quick-sand, should have gone so far below that the ingenuity and the experiences of man, applied for years, has been unable to find it.

There may be an underflow governed by laws having reference to diversions, and governed by principles which at common law were applicable to the doctrine of riparian rights; but to my mind every fact stated by our friends demonstrates its nonexistence

here, and, as well, the inconclusiveness of the entire case, and the fact that the State of Kansas is really experimenting here, claiming an injury of some sort which it may and in all probability does, to some extent, suffer, but asking this court to define for it what the remedy may be against the State of Colorado, which, it claims, has interfered with its rights and produced the injury complained of.

In this connection the attorney-general says that it is not right that one part and section of this country should grow at the expense of another; that one state can not prosper by depriving another of its prosperity; that one state can not utilize its industries and its resources, if, by so doing, it practically cripples another.

That may possibly be; but what is this bill attempting to do except, in a judicial manner, and by the processes of the law, seeking to promote Kansas prosperity at the expense of the State of Colorado? If we can not use this water, and if the appropriations which are made are to terminate at some time, and then forever, the immense areas which have now been reclaimed, which are under cultivation, and which furnish ample supplies for our population of 650,000 people, must, if they do not wholly return to the desert, be very seriously damnified.

There are many things in the relations of the states to each other whereby one does prosper at the expense of another, perhaps where its legislation may impinge here and there upon the welfare, or upon the institutions of the other. But are they justifiable? Are they actionable? Can the one state summon the other into this tribunal and ask it to fix a rule whereby

shall be determined just how far one state may prosper at the expense of anotner? If so, then states will become the commonest of litigants in this court, and the docket of the court's original cases will be greater in the course of a few years than the docket of those that are here on error and on appeal.

I do not think I have much time left. The generosity of this court has been such, with reference to time, that I do not desire to trespass one moment beyond the allotted period. I merely wish, before taking my seat, to reiterate the fact that in our judgment, although we may be mistaken, the importance and the consequences of this case are as great, if not greater, than any that has appealed to the consideration of this honorable court for many years. It indirectly affects interests that are not only far-reaching in the State of Colorado, but in other states that are similarly situated. For if Kansas can require this court to make a decree which in its effect will limit our power to use the waters of the Arkansas for beneficial purposes, for necessary purposes, the State of Nebraska may do likewise with the waters of the Platte; the territory of New Mexico with those of the Rio Grande; the State of Utah with those of the Grand, and the Territory of Arizona with the waters of the San Juan; and states adjoining Wyoming, Idaho and Montana may likewise assert the same doctrine, through the agency of this court, and thereby make agriculture and stock raising in all their various phases a part of the past history of that great section.

The gentlemen were asked by one of the justices (I forget now which) what sort of a decree would be determined upon, and upon whom would it be served?

Apart from the question of parties, to which attention has been called, and called very fully in the brief, their absence and the necessary adjudication of their rights in this proceeding, what sort of a decree could this court declare against the State of Colorado? That it must allow fifty per cent. of these waters to pass? That it can only use the flood waters? That it must restrict the area of irrigable lands? That it must confine itself exclusively to the statutes of congress upon the subject of appropriation and diversion?

Upon whom will it be served? Upon the governor, upon the general assembly, or upon the Supreme Court, or upon all? In what way can the power of that state, if it exists, be limited by any decree; and in what manner can that decree be made effective?

Mr. Justice Harlan: Upon that matter let me ask you this question: I take it that if the State of Kansas held one of the bonds of the State of Colorado, it could sue Colorado in this court?

Mr. Thomas: If it was the bona fide owner.

Mr. Justice Harlan: Yes. If we rendered a judgment in favor of the State of Kansas, how could this court enforce it? Would the inability of this court to enforce that judgment be a reason why we should not take jurisdiction to determine as to the rights of the parties?

Mr. Thomas: As to the first branch of your honor's question, I must say that I can not answer as to how the court would enforce it. As to the second, I think it would and ought to have much to do with the question of the character of the decree, since its enforcement might be and probably would be a matter of such delicate nature.

Mr. Justice Harlan: Assuming that this is a justiciable controversy that may be brought into the courts, although there is no party upon whom to serve the decree, might not the court take jurisdiction and declare the rights of these two states?

Mr. Thomas: It might; but it seems to me that the fact of the difficulties attendant upon the possibility of its enforcement ought to go to the question of the jurisdiction of the court in the first instance. Were not those things considered by the fathers, in the formation of the Constitution, when they fixed the jurisdiction of this court in controversies between states?

I think my time is up; and I desire for my colleagues, as well as myself to express our sincere gratitude to this court for the kind consideration they have given us, and particularly in the extension of time so necessary for the discussion of such important questions.

The Chief Justice: I suppose, gentlemen, there is no objection to having Mr. Justice Gray participate in the consideration of this case if he wishes to do so?

Mr. Thomas: No, sir; on the contrary, we ask it, if his health will permit.

(Counsel on both sides requested and were granted permission to file short additional briefs.)

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IN THE

# SUPREME COURT

OF THE

# UNITED STATES.

THE STATE OF KANSAS,
*Complainant,*

vs.

THE STATE OF COLORADO,
THE ARKANSAS VALLEY SUGAR BEET AND IRRIGATED LAND COMPANY, ET AL.,
*Defendants.*

**Brief of Counsel for the Arkansas Valley Sugar Beet and Irrigated Land Company and other Individual Defendants, in Support of their Motion to Dismiss the Bill of Complaint Herein.**

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The first proposition we advance in support of the motion to dismiss is, that while the original bill presented a controversy between the State of Kansas and the State of Colorado, and therefore one cognizable in an original action in this Court, the amended bill, as against these defendants, presents a controversy between the owners of lands along the Arkansas River in Kansas and the appropria-

tors of water from said river in Colorado, of which this Court cannot, under its constitutional and statutory limitations, take original jurisdiction.

The fundamental right which Kansas asserts and seeks to protect is the same in the original and amended bill. It is that, by the principles of the common law, every owner of land along the Arkansas River in Kansas, has, as against the State of Colorado and the owners of lands in Colorado along said river, a natural and equal right to the use of the water in said river adjacent to his land, without material diminution or alteration.

In the original bill it was alleged that the State of Colorado was itself diverting the waters of said river, in violation of such right, and that by its constitution and statutes it assumed and exercised such ownership and control of the waters of said river in Colorado as would operate to ultimately deprive the owners of lands along said river in Kansas of the entire flow of said stream. It was also alleged that under said constitution and statutes, upwards of one hundred and fifty persons, firms and corporations claimed to have acquired the right to divert the waters of said river for the irrigation of arid, non-riparian land, and that they were diverting and would continue to divert the waters to such an extent as to prevent any part thereof flowing into the State of Kansas during the annual growing season. It was, however, not the object of the bill to reach these individual appropriators directly nor to concede that they were necessary or even proper parties.

The point which it is manifest from the allegations of the bill and the briefs filed in its support was the principal concern of the pleader, was the statement of a case which would not only invoke the original jurisdiction of this Court, but retain it until a decree upon the merits should be obtained. The bill and brief evidence thorough consideration of the jurisdictional questions likely to be presented. It is in fact well known that every phase of the case was long and laboriously examined by the original counsel appearing for the State of Kansas and that the bill was drawn with the definite purpose of avoiding all possibility of the case being other than one between states.

It was the theory of the pleader that if the State of Colorado could be considered the sole wrong-doer, that is that it was legally responsible for the appropriations of others as well as its own it would follow that the owners of lands along the Arkansas River in Kansas would be remediless, unless an action might be instituted in their behalf by the State of Kansas. From this, it was deemed to follow that, although the riparian rights to be protected were strictly private and in no sense public, the state, by reason of the number of citizens to be protected and by reason of the fact that they could not individually bring actions against the State of Colorado, would be entitled to act in its sovereign capacity as a litigant in their behalf. This view, if valid and persisted in would serve to avoid all possibility of the case drifting

into one between private parties in Kansas and private parties in Colorado, and thereby into one not justiciable in this Court.

In the brief filed in support of the motion for leave to file the bill, at page 13 it is said;

> "The State of Kansas is a party to the proposed suit in virtue of its sovereign and corporate capacity. It seeks to protect the rights and property of its citizens from wrongs and injuries against which such citizens neither individually nor collectively, can claim protection in any court. The wrongs and injuries complained of in the bill directly affect the valued rights and the vital interests of 100,000 citizens of the state of Kansas. The usefulness and value of 2,500,000 acres of fertile land are being and are threatened to be practically destroyed. The right of the public of the state of Kansas to the free and untrammeled use of the waters of the Arkansas River in that state for public purposes is taken and threatened to be taken away. and the public health is impaired and imperiled.
>
> If the proposed suit cannot be maintained by the State of Kansas in behalf and for the protection of its citizens who are riparian owners in the valley of the Arkansas River, there is no means known to the law by which those citizens can be protected against the wrongs and injuries alleged in the bill. There is no forum in which their complaint can be heard or their grievances redressed. The State of Colorado cannot be brought to the bar of any court by these injured citizens, and unless the State of Kansas in its sovereign

> capacity, and on behalf and for the protection of the interests of its public and of these citizens, is permitted to maintain this suit, there is presented the strange anomaly of a large number of the citizens of the state, and a large and one of the most valuable portions of its territory, subjected to the wrongs and irreparable injuries of another state, without authority or power to invoke the protection of any tribunal. This condition of affairs—power to inflict such injuries, with no corresponding remedial right—finds no sanction in the maxims of equity or law."

It is to be observed that in stating the case for the purpose of jurisdiction in this Court, no note is made of the undoubted right of each or all of the riparian owners in Kansas to maintain an action or actions against each or all of the persons or corporations appropriating water in Colorado.

If counsel had correctly stated the action of the State of Colorado in respect to its own diversion of water and in respect to the foundation of the rights claimed by the appropriators in Colorado, it is possible the case might properly have proceeded as one between states, though as to that these defendants are not called upon to express an opinion. But it appeared upon the coming in of the answer that whatever intention the State of Colorado may once have had to divert water by the construction and maintenance of its own ditch, that intention had long before been abandoned, and the state denied any intention of making any diversion of the natural flow of the river.

It was also made to appear that the several appropriations of the waters of said river complained of in the bill were made in accordance with and in reliance upon the doctrine respecting the appropriation of the waters of natural streams for beneficial uses which, by usage and custom, prevailed in the arid region of the United States at the time said appropriations were made and which, by the recognition and approval of the United States, had at all times been the law applicable to the public lands in said arid region, and that the Legislature of Colorado had not authorized or licensed the diversion of water from said river, but on the contrary had done no more than recognize, by appropriate legislation, the right to make such diversion, as one founded on necessity and the usages and customs of the arid region of the United States existing prior to the adoption of the constitution of the State of Colorado.

It being obvious that if the allegations of the answer were true no relief could be had against the State of Colorado, the counsel for Kansas (succeeding those who prepared the bill and the argument in its support) asked leave and were permitted to file an amended bill. This amended bill differs from the original only in making individual appropriators parties defendant and in the addition of allegations appropriate to such change. By the introduction of these defendants, however, the controversy has been materially changed, and instead of being one between states, it is now, in

substance, one between citizens of different states, a change, in our judgment, vitally affecting the original jurisdiction of this Court. In the first place, the change has swept away the claim advanced by counsel that:

> "If the proposed suit cannot be maintained by the State of Kansas in behalf and for the protection of its citizens who are riparian owners in the valley of the Arkansas, there is no means known to the law by which those citizens can be protected against the wrongs and injuries alleged in the bill."

Assuming that the answer of Colorado is true and that no judgment can be entered against her, the only relief that can be demanded is against these individual defendants. But as against these defendants, the citizens of Kansas who own land along the Arkansas River, have a forum in the Federal Court and doubtless in the Courts of Colorado, where they can obtain all the relief to which they may be entitled in respect to the cause of action set forth in the bill filed by Kansas. They would be entitled to apply for relief in the local Federal Court on the grounds of diverse citizenship and also on the ground that a construction of the Acts of Congress respecting grants of public land is involved in the determination of the extent to which riparian rights attach to such lands.

We of course do not overlook the fact that the State of Kansas is the owner of 126.56 acres of land riparian to the Arkansas River and that it may,

in its proprietary capacity, bring an action in this Court to protect such riparian rights as appertain thereto. If the relief demanded were with reference to this tract only, the motion to dismiss on the grounds set forth might not be well taken, but the bill treats this tract as a mere incident of the larger claim on behalf of all the riparian lands in the valley. There is no several relief demanded upon behalf of the land owned by the state and the land owned by the several thousand citizens of Kansas in the valley of the Arkansas. The prayer of the bill accords with the alleged rights of all the owners of riparian lands along said river in Kansas. The substantive allegations of the bill so far as these defendants are concerned are the same as they would be if an action were brought by one or more of the owners of of lands along said river in Kansas in a *nisi prius* court against these defendants as appropriators in Colorado, or by the owners of lands in eastern Kansas in the courts of Kansas against the appropriators from said river in western Kansas.

This brings us to a more elaborate consideration of the right which, as against these defendants, it is the purpose of the bill to protect. That right, as we have already said, is the right which it is claimed every owner of land riparian to a stream has to its substantially undiminished and unimpaired flow. It is true that the bill contains allegations to the effect that the flow of water in the river bed is of great value to the people of the

vicinity, by reason of the fact that the evaporation tends to cool and moisten the surrounding atmosphere, thereby greatly promoting the growth of all vegetation, enhancing the value of lands in the vicinity and conducing directly and materially to the public health and making the locality habitable. We do not suppose, however, that this is intended as the substance of the case against these defendants. It seems to us that we should treat it as a bit of poetical license excusably exercised by the original counsel for Kansas.

It will certainly seem a novel view to the residents of the Mississippi Valley who seek the higher ground to escape the miasmatic vapors of the rivers. It also contradicts the prevaling belief, if not the established fact, that the dry air of western Kansas and of Colorado generally is highly beneficial to health. Indeed, the briefs filed upon the part of Kansas indicate no intention to rely upon this allegation as a substantive matter. The principal brief heretofore filed makes no reference to this claim, but on the contrary makes the positive statement that

> "The gist of this proceeding lies in the fact that the State of Kansas is the riparian owner of lands within its boundaries, and the further fact that the State of Colorado is, if not at present, in future contemplation a very great offender against out rights."

It would also seem that, in the judgment of this Court, it is immaterial, since, among the many

matters upon which it is suggested in the opinion of this Court evidence should be taken, that of the effect of the diversion of the water upon the health of the citizens in the valley of the Arkansas is not mentioned.

That no doubt may be entertained as to the correctness of our claim that injury to the alleged rights of riparian proprietors is the foundation of the action, we refer to the allegations of the bill at pages 9, 10, 11 and 12, where is set out in detail the acquisition of title and the present ownership by individuals of lands along the river, and also to pages 25 and 26, where it is stated that:

> "When the Territory of Kansas was organized in the year 1854, it extended from its present eastern boundary to the summit of the Rocky Mountains, and all of the present drainage area of the Arkansas River in Colorado was then included in the Territory of Kansas, *and during all of the period from then to the organization of the State of Kansas, the common law and the riparian rights herein claimed extended over the whole of the Arkansas Valley and to the summit of the Rocky Mountains and had for many years prior thereto.* By reason of the prior settlement, occupation and title of the inhabitants of the State of Kansas upon and to the lands situated in the valley of said river, including those upon the banks of said river, the State of Kansas and the owners of lands in said valley did acquire and now have the right to the uninterrupted and unimpeded flow of all the waters of said river into and across the State of Kansas."

In the motion for leave to file the bill, being the first step in this action, it is stated, on page 3, that:

> "All the lands in said river valley in the State of Kansas were formerly and originally a part of the public domain of the United States, and title to all of said lands was acquired from the United States by settlers, grantees and purchasers in whom and in whose successors in interests, the said title, together with all riparian and other rights appertaining to said lands, have remained at all times and are still vested. * * * * That at the time the title to said lands passed from the United States to said settlers, grantees and purchasers all the riparian and other rights of the common law attached to said lands as incident to said title."

And in the brief filed in support of that motion, it is, on page 2, declared that:

> "The question of the complainant's right to the relief it seeks in this suit is to be determined entirely by the rules of the common law, irrespective of any customs, regulations or laws of the State of Colorado in derogation thereof. The rules and doctrines of the common law respecting the rights and remedies of riparian owners have never been abrogated or in any manner modified by the State of Kansas or its Legislature. The common law has been in force in both Kansas and Colorado since long prior to their admission into the Union."

In fact that brief contains little else than an exposition of the common law of riparian rights,

which it is claimed establishes the rights intended to be protected by the bill.

In the very comprehensive brief filed in resisting the demurrer of the State of Colorado to the original bill, the one point continuously kept to the front is the applicability of the common law to the issues sought to be presented.

We seem to be fully justified in our conclusions respecting the foundation of this action, by the view taken by the Attorney General of the United States in the petition of intervention heretofore filed by the Government in this case. It will be observed that the specific purpose of that petition is to negative the pretensions of the State of Kansas with respect to the applicability of the common law in determining the rights of the owners of lands along the Arkansas River in Kansas.

Now the striking thing is that the right which a riparian owner has at common law to the flow of a stream, is a purely private one. It is in no sense public. It pertains to the land as an incident of the land. The common law rule, in other words, determines the use which an individual, not the public, may make of an unnavigable stream of water because of his ownership of the land over or against which it may flow. The public has no more juridical concern in it than it has in the cultivation of the land, the use of the house, barn and outbuildings, or any other subject of use on the land. There are, of course, rights which are both public and private in their nature, as there are wrongs redress-

able by either the state or the individual specially affected, but the right in question has no such dual character.

So far as the books throw light on the subject, it does not appear that any one has ever heretofore asserted the right of a state, in the manner here proposed, to protect a riparian owner against the invasion of his property, and we fail to discover any reason for distinguishing, in this respect, between a domestic and a foreign invader. Relief by private action may be had in one case as well as in the other. We therefore urge with confidence that the substantive cause of action alleged against these defendants rests upon purely private rights and that in the determination of the issues as will hereafter more fully appear, the owners of such rights are necessary parties.

Passing now to the issues which the bill contemplated should be disposed of, it will be noted that Kansas does not stop with the statement of its own position, but it anticipates and attempts to negative the position of Colorado.

That it is intended that the Court should not only determine the validity of the claim made by Kansas, but that of the defendants as well, and that their relative rights should, in the largest degree possible, be determined and that an end should be made of all controversies concerning the use of the waters of the Arkansas River as between the owners of riparian lands in Kansas and the appropriators in Colorado, is manifested by the prayer that the

Court should "fix and define the respective rights of Kansas and the defendants herein in and to the waters of the Arkansas River, its affluents and tributaries and enter such decree as may be necessary for the adequate protection of the rights so fixed and defined." This prayer is as broad as the powers of equity. It means that each person concerned, whether plaintiff or defendant, should have the exact nature and extent of his rights ascertained and should be adjudged entitled to the same as against his adversary.

So long as the controversy was one between Kansas and Colorado only, it might be said that nothing was involved but their respective contentions as to the rule of law which should prevail; but when these defendants were made parties, the nature of the case, as to them at least, entirely changed. It must have been foreseen, by the counsel who thought it necessary to make these defendants parties, that one or all of them might defend upon grounds other than the doctrine of appropriation to beneficial uses. They might admit the applicability of the common law as construed and contended for by Kansas and still justify and maintain their right to divert the water by the rules of the same common law upon which Kansas has founded its action. By the principles of that law, one may lose rights as well as gain them. Athough it may be true that the owners of lands along the Arkansas River in Kansas acquired the rights claimed by them, it may also be

true that by subsequent acts or conduct they have surrendered them in favor of one or all of the appropriators in Colorado. Moreover, this being a proceeding in equity, all of the reasons tending to show that it would be inequitable to grant the relief demanded may be advanced by the defendants. The defendants have in fact defended by reference to those principles which are as much a part of legal and equity jurisprudence as is the doctrine of riparian rights contended for by Kansas. Laches, estoppel, acquiescence, abandonment, adverse user, the statute of limitations and other well recognized defenses are stated in the several and separate answers of these defendants. Assuming that the common law respecting riparian rights prevails in Kansas as contended, they are the same defenses that would doubtless be made by the appropriators in western Kansas if they were made parties to a similar proceeding instituted by the riparian owners in eastern Kansas.

Upon the issues presented by these answers, evidence is to be taken and much time and money will be required in the proper preparation and presentation of that evidence. And for what purpose? Why, to defeat the claims of the owners of lands along the Arkansas River in Kansas as made in the bill of complaint, and, in the language of the prayer of the bill above referred to "to fix and define their (defendants') rights in and to the waters of the Arkansas River, its affluents and tributaries,

and to obtain such decree as may be necessary for the adequate protection of the rights so fixed and defined." If successful in their contention, against whom will their rights be protected? If they are "to obtain such decree as may be necessary for the adequate protection of the rights so fixed and defined," against whom should the decree run? Is it sufficient if it is against the State of Kansas only, or is it necessary that it should be against the riparian owners in Kansas in whose behalf and in reliance upon whose alleged rights this action was commenced? Unless it can be said that a decree against the State of Kansas will bind each owner of land along the river in Kansas, this controversy as to these defendants will practically settle nothing. Although called into court to exhibit and have adjudicated their claims to water as against the riparian owner in Kansas, nothing will be accomplished in the way of securing that peace as between all parties beneficially interested which it is the particular aim of courts of equity to give.

If Harry Crittenden, T. B. Martin or others owning lands along the river in Hamilton County, Kansas, should bring an action in the United States Court against The Arkansas Valley Sugar Beet and Irrigated Land Company, claiming riparian rights on the Arkansas River and seeking to restrain the latter from a diversion in Colorado, and the latter could not plead in bar a decree in its favor in this proceeding, then the latter has

been subjected to vexatious and unnecessary burdens in defending this suit.

We have already said that we know of no rule of law which permits a state to wage a suit to establish or protect a private right of one or more of its citizens. The right to do so was denied in

New Hampshire vs. Lousiana, 108 U. S. 76.

Nor do we find in any of the rules by which persons become bound by the result of judicial proceedings, any principle by reference to which a judgment against Kansas in this case would operate as a judgment against those upon behalf of whom Kansas claims the right to act. The opinions in

Stryker vs. Goodnow, 123 U. S. 528, and
Litchfield vs. Goodnow, 123 U. S. 551,

fail to state any rule concerning parties which would tend to sustain the contention that Kansas is in any way in privity with its citizens as to their private rights.

If the rights claimed by the riparian owners in Kansas may be asserted in this proceeding, and they may enjoy the benefits if successful, it would seem contrary to natural justice if they are not to be held to the consequences of defeat.

The riparian owners are the parties interested, both legally and beneficially, in the subject matter of this proceeding. As such, it is our contention that they are necessary parties. But one citation is necessary in support of this contention, and that is the recent decision in

Minnesota vs. No. Securities Co., 184 U. S. 235. Though upon the subject generally we cite Foster's Federal Practice, §53. Story's Eq. Pleading §72 et seq.

When the original bill was filed, it appeared to be the theory of the pleader that a judgment for or against Colorado would be a judgment for or against the individual appropriators to the same extent as though the latter were parties by name. The converse of this would be that a judgment for or against Kansas would be a judgment for or against the riparian owners. But Kansas abandoned this theory when it found it necessary to make these defendants parties. If the theory does not hold good as to the representative character of Colorado, we fail to see how it can hold good as to the representative character of Kansas. Indeed the representative character of Colorado, under the allegations of the bill, is certainly more apparent than that of Kansas. The former is alleged to be the author or parent of the wrongs complained of, while, as to the rights to be protected, it appears that their origin antedates the creation of the State of Kansas. It may be doubted whether, as between the riparian owners in Kansas and the appropriators in Colorado, this case can determine anything, unless the former are made parties as the latter have been. If Colorado does not represent and bind the appropriator and Kansas does not represent and bind the riparian owner, there is nothing to decide

but the academic question as to what rule of law prevails in respect to the use of the waters of the Arkansas River.

In suggesting that the persons residing in Kansas upon whose behalf this action purports to be brought must be made parties, we do not, of course, contend that they can be made such in this Court. To do so, would oust the jurisdiction. Wherefore, our motion is not that they be made parties, but that by reason of the necessity of their being made parties, the bill be dismissed.

We do not overlook, in this connection, the rule that where parties with rights in common are numerous, an action may be brought in their behalf by one or more of their number, it being made to appear by proper pleadings that all are bound by representation. Kansas, however, does not claim to act by solicitation of the owners of lands along the Arkansas River, nor to base its claim to relief upon the ground of a common interest. It assumes, with respect to them, the attitude of a sovereign, protecting their alleged rights whether they claim such protection or do not. It invokes the jurisdiction of this Court, not because it is a riparian owner in common with many of its citizens, but because in its sovereign capacity, it is entitled of its own motion to appeal to this Court to protect its sovereign welfare in respect to the riparian rights of its citizens against impairment. The rule of representation referred to was never intended to permit private persons to litigate their private contro-

versies in an original proceeding in this Court under cover of the name of a state. Primarily, those who claim that their rights have been invaded must themselves become litigants by name. The exception noted is founded on expediency and is only permissible where the intent of those not named to be bound by the judgment for or against those named is made to appear or can be assumed.

The second reason for the motion is that certain citizens and residents of Kansas are owners of lands under one or more of the canals of these defendants and that they are appropriators and users, through said canals, of the waters of said river. The rights claimed by them as appropriators are not necessarily represented by the company owning the canals through which the rights are exercised. Nevertheless, the theory of the bill is that although not parties by name, they are to be concluded by the judgment which Kansas seeks to obtain. If their interests are to be thus determined, they are clearly necessary parties. They should therefore be before the court either actually or constructively. The bill contains no allegations which would satisfy this requirement either by representation or otherwise. Stockholders of an irrigation company using water for irrigation upon the basis of stock need not be made parties, but the right of a user of water through a canal by the acquisition of a water right is a separate and distinct property which cannot be disposed of by any principle of representation.

The case is therefore, in this respect, one in which relief is to be had against citizens of Kansas by the State of Kansas and falls within the ruling in

California vs. So. Pac. Ry., 157 U. S. 229.

Another reason for dismissing the bill is brought sharply to the front by the petition of intervention filed on behalf of the United States That petition shows that the controversy is not a clearly defined one between the State of Kansas on the one side and the State of Colorado and certain of its citizens on the other, but is really one between the State of Kansas and certain of its riparian proprietors on the one side and the United States and certain of the grantees of its lands within the valley of the Arkansas both in Kansas and Colorado on the other. The interest of Colorado and these defendants is but an incident of a larger interest arising out of conditions affecting the whole country west of the 99th Meridian, without regard to state lines. The United States, as the primary owner of the lands and waters in Kansas and Colorado, shows to the Court that all the lands within the water shed of the Arkansas west of the 99th Meridian are arid and that only by means of irrigation can they be reclaimed, and that by reason thereof, the common law contended for by Kansas has, as to the waters flowing through said arid lands, been abrogated, and in lieu thereof there has grown up the doctrine that said waters may be appropriated and used for the reclamation and cultivation of said lands. Speak-

ing for itself, as the owner of lands in Kansas and in defense of those to whom it has heretofore granted lands in western Kansas and in Colorado, it traverses the contention of Kansas as to the rights of the riparian owners in Kansas.

It is made to appear by this petition, as well as by the answers of these defendants, that the State of Kansas is claiming adversely to the general Government and to its own citizens as the owners of lands west of the 99th Meridian. Although they may not be bound by a judgment in this case, it is certainly the purpose of the action to establish a rule of law which shall bind them in like controversies to as great a degree as they would be bound if parties hereto.

There seems to be no escaping the fact that the controversy is as much between Kansas and its citizens west of the 99th Meridian as it is between Kansas and these defendants. While the bill assumes to select these defendants as representing a policy or rule prevailing in Colorado only, it is perfectly clear that these defendants do not represent a policy or rule confined within the state lines of Colorado, but they do in the fullest sense represent a policy or rule which disregards state lines and extends into the State of Kansas. The correctness of this view does not depend upon the issuable allegations of the answer of these defendants, nor upon the petition of the general Government. The judicial notice which this Court takes of the statutes of Kansas brings to the de-

termination of this controversy full knowledge of the policy and rule solemnly declared by Kansas for the benefit of the lands west of the 99th Meridian belonging to its citizens, as well as those still held by the general Government, which is in direct contradiction to the claim now made as a foundation for the relief demanded in the bill.

The answers of The Arkansas Valley Sugar Beet and Irrigated Land Company present the true nature of this controversy in concrete form. The Amity Canal, now belonging to to that Company, was constructed after Kansas had declared that the waters of the natural streams in Kansas might be diverted for irrigation, a declaration which necessarily meant that the water was to be used on Kansas lands. It was built to irrigate lands in Kansas, as well as in Colorado, no distinction being recognized between the two states as to the rights which it might acquire in the waters flowing through both. It found the law prevailing in western Kansas and in Colorado in respect to the appropriation of water to be identical, and for its purposes, the state line passing through the territory to be irrigated was of no consequence whatever. This bill, by assailing the right of the Amity to divert water for the irrigation of Kansas lands, as completely challenges its own laws and raises an issue with its own citizens as though the headgate of the Amity were in Kansas instead of Colorado.

Unless it is permissible for Kansas to question

its own statutes and the rights of its own citizens in this Court, we fail to perceive a reason why this Court should longer retain jurisdiction.

The issue with the Government, to which we call attention, is not limited to what has occurred in the past, but extends to the future purposes of the Government in the development of the irrigation possibilities of the Arkansas River. The theory of the Government is that it has never surrendered its right to make the waters within the arid public domain aid in the sale and reclamation of its lands. In parting with its title to arid lands, it has given to the purchaser permission to divert water from the streams belonging to it, and it has denounced as inapplicable the opposing legal principle now maintained by Kansas. By the act approved June 17th, 1902, known as the "Reclamation Act," Congress has asserted such interest in the waters of the Arkansas River as entitle it to catch, store and impound the unappropriated waters of said river and to use the same in reclaiming, rendering habitable and salable, and making productive and profitable, the lands now belonging to it and to private owners both in Colorado and Kansas,—an interest it must have possessed since the date of the acquisition of the Louisiana territory and one which has as its foundation the right which these defendants are now defending upon behalf of themselves and all others in the like situation both in Colorado and Kansas.

It is for the Court to say at this time, and as an

essential matter in the determination of this motion, whether the United States has such interest in the Arkansas River as it has always claimed and now specifically advances. If its interest will sustain its scheme of development and reclamation as outlined in its petition, then the case presented seems the same as that in Wisconsin vs. Duluth, 96 U. S. 379.

While it is true that these defendants may be said to be here to the limited extent of their own alleged wrong-doing, their cause is virtually taken up and their defense adopted by the general Government. They become but part of a larger whole. Their agency in the reclamation of the lands under their ditches, in accordance with the rights claimed by the general Government in the Arkansas River, is acknowledged and approved, and they become in the fullest manner what Kansas may have intended they should be, the representatives of the Government and of every one relying upon the Government's claim of interest in the waters of the Arkansas. They are now shown to be but instruments in that scheme for the reclamation and cultivation of the arid lands along the Arkansas River which the Government, by the Reclamation Act referred to, now intends to carry to its furthest limit. What they have done and what the Government intends to do are one. The Government justifies itself and all the acts of these defendants by the common legal principle that neither Kansas nor its citizens can interfere with what these de-

fendants have done acting under the authority of the Government nor what the Government now proposes to do in its own behalf.

By the foregoing, we have endeavored to make plain these propositions:

1st. That while the inability of the riparian owners in Kansas to bring an action against the State of Colorado may be a reason why Kansas may bring an action in their behalf, that reason does not obtain when individuals against whom said riparian owners may themselves proceed are the alleged wrong-doers.

2nd. That the assertion of the rights of the owners of lands along the Arkansas in Kansas against these defendants contemplated and invited exactly the same defenses and the same issues that would be presented and settled if said owners were plaintiffs by name.

3rd. That these defendants, as respects the relative rights of themselves and the riparian owners in Kansas, are entitled to the same form of decree that they would be if the riparian owners in Kansas were parties by name.

4th. That unless said riparian owners in Kansas will be bound by the judgment which may be entered in this case, they are necessary parties.

5th. That if a judgment against these defendants will restrain or interfere with the use of the waters of the Arkansas River by the citizens of Kansas who own lands under the canals of the de-

fendants, said citizens of Kansas are necessary parties.

6th. That if this proceeding is to establish a right upon behalf of riparian owners along the Arkansas River in eastern Kansas, contrary to and in derogation of the rights of appropriators in western Kansas, said appropriators would seem to be necessary parties.

7th. That this proceeding, as to the questions presented, is really a controversy between the State of Kansas and certain of its riparian proprietors on the one hand, and the United States and the grantees of its lands appropriating water from the Arkansas River both in Colorado and western Kansas on the other.

8th. That the acts complained of were in pursuance of the policy of the United States to devote the waters of the Arkansas River to the reclamation of arid land, and that said acts have been approved and adopted by the United States, and the same appear to be but parts of the scheme of the United States to reclaim all of the lands in the Arkansas valley, so far as the volume of water in said river will permit.

It seems to us that if we have made it clear that these propositions are well founded, the case is not one justiciable as an original proceeding in this Court.

This brings us to a brief consideration of the possible reasons which may be advanced why the case may proceed against these defendants, with

Kansas as sole plaintiff and without making the riparian owners in Kansas parties.

It may be claimed that it is not to compare and determine the relative rights to the waters of the Arkansas of the riparian owners in Kansas and the appropriators in Colorado. It may be that while assuming to represent and rest upon the rights of its riparian owners, the state also claims such paramountcy or ultimate sovereignity in the right itself that the owners cannot relinquish, surrender or otherwise part with the same. We confess our entire inability to find authority giving even the colour of support to such a contention.

In preparing our defense to the bill, we have acted in the belief that if all the riparian owners in Kansas had executed appropriate legal instruments relinquishing their riparian rights in the Arkansas River in favor of the appropriations made by these defendants, this action could not be maintained. We have also been of the opinion that if it could be shown that these rights have been lost by the operation of the statute of limitations, laches, estoppel, adverse user, etc., the position would be exactly the same as in case of relinquishment by deed. This opinion seems to be justified by the recent decision of this Court in Toltec Ranch Co. vs. Cook, 191 U. S. 532.

The elaboration in the bill of the ways by which the lands in Kansas are benefitted by the flow of water, the use to which the lands may be put, the various kinds of crops grown, the number

of people employed in raising them, the profits derived therefrom, the value of the lands in the market, the state revenues derivable therefrom and the general results flowing from the pursuit of agriculture on these lands, certainly does no more than state the incidents of a riparian right which it is within the power of the riparian owner, by his own acts, to impair or destroy.

If every riparian owner should give a deed relinquishing his right to water as against these defendants, we see no ground upon which the state could complain, unless it be upon the theory that it has a right to compel the continuance of the conditions incident to riparian ownership, and that the riparian owner could, in effect, be restrained from any act which would take from the State of Kansas the benefits above elaborately stated.

We respectfully submit that the motion filed to dismiss the bill should be granted.

Respectfully submitted,

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